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In The

SUPREME COURT OF THE UNITED STATES

ROBERT L. JOSEPH,

Petitioner,

v.

SALT LAKE CITY CORPORATION
STATE OF UTAH

On Petition For Writ Of Certiorari
To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI (No. 2)

Robert L. Joseph
1156 Lost Eden Drive
Sandy, Utah 84094
(801) 571-3098

– CONFIDENTIAL –
INDIVIDUALLY IDENTIFIABLE
HEALTH INFORMATION INCLUDED

129 pp

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QUESTIONS PRESENTED

With particularity, the Questions presented are, to wit:

1. Did the Utah Court of Appeals follow stare decisis concerning interpretation and application administrative law?

2. Did Officer Joseph's "justified" conduct bar the city from administrative action under the good faith qualified immunity defense?

3. Did the State of Utah and the City violate the Health Information Portability and Accountability Act of 1996 by wrongfully disclosing to the public at large confidential health information of Officer Joseph?

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INTRODUCTION

Robert L. Joseph, a peace officer, originally petitioned for a judicial review of a termination order to the Utah Court of Appeals from the dismissal of his appeal by the Salt Lake Civil Service Commission. The commission's duty is to review the police chief's decision to suspend or terminate peace officers providing them a "full and fair hearing to determine the matter."

In this matter, the State of Utah determined that Officer Joseph was justified in his use of deadly force because he exercised such force in self-defense. (App. 71, 79-86). Contrary to the State's conclusion, the police chief first terminated Mr. Joseph, then adjusted it to a suspension. (App. 14, 19, 43). In that same adjustment letter, the chief required officer Joseph to undergo another fitness for duty evaluation, (app. 15), even though he had already completed one successfully. (App. 65-66). The decision of the chief was deliberate and was a scheme set up by the City Attorney's Office to oust Officer Joseph from the force in retaliation for Officer Joseph negative publicity to the Press. (App. 77-78). The Press Conference was protected conduct because it was conducted by Officer Joseph's attorney, after successfully dismissing bogus felony charges – a baseless prosecution the city previously pursued.

However, due to concerted misconduct on the part of the City, the civil service commission upheld the chief's discharge upon other grounds. Ultimately, the decision of the commission violated Utah law, particularly Utah Code Ann. § 10-3-1012 (1953, as amended). The statute conveyed the commission only limited authority to "fully hear and determine the matter;" its beyond the discretion of the commission to uphold the police chief's decision upon other grounds as it did in this matter.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Robert L. Joseph (hereinafter "Officer Joseph") respectfully petitions for a writ of certiorari to review the judgment of the Utah Court of Appeals in this case, after the Utah Supreme Court declined to issue a writ of certiorari.

OPINIONS BELOW

The decision of the Utah Supreme Court denying the Petitioner a writ of certiorari to the Utah Court of Appeals and the Utah Court of Appeals' Memorandum Decision are contained in the Appendix at App. 2-9. The order of this Court which extended the filing time is contained in the Appendix at App. 1.[1]

JURISDICTION

The final decision of the Utah Supreme Court denying the Petitioner a writ of certiorari to the Utah Court of Appeals was entered on December 20, 2002. (App. 2). The jurisdiction of this Court to review this matter is invoked under 28 U.S.C. § 1257(a).[2]

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1 Contrary to the allegations raised in the City's response to Officer Joseph's first petition, the Utah Supreme Court construed this Court's enlargement of time to apply to both of Officer Joseph's appeals.

2 Meanwhile, a RICO action is pending against the City, in the U.S. District Court, District of Utah under *Robert*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provision is involved in this case:

The Due Process clause of the Fourteenth Amendment, which provides, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following statutory provisions are involved in this case:

Utah Code Ann. § 10-3-1012 (1953, as amended). See page 11, infra.

Health Information Portability and Accountability Act of 1996. See page 22-24, infra.

Joseph v. Dee Dee Corradini, et al, case no. 2:00 CV 0340 K. However, in order to maintain subject matter jurisdiction, this petition is filed in accordance with the *Rooker-Feldman* doctrine.

STATEMENT OF THE CASE

I. Nature of the Case:

On March 26, 1999, a fleeing felon forced Officer Joseph (who while acting in his capacity as a Salt Lake Police Officer) to use deadly force upon the suspect, when he ran-down Officer Joseph in his motor vehicle as he attempted to flee due to outstanding felony drug warrants. (App. 40, 71, 79, 83, 87). The felon later breath-tested a .237 BAC. In the incident, Officer Joseph sustained injuries when he was struck by the car, scooped up by the driver's open car door, and then thrown to the ground when the suspect slammed on his brakes. (App. 87, 72). During the event, Officer Joseph discharged 11 rounds into the vehicle, twice striking the suspect. However, he did not empty his service pistol. Each shot was determined to be within State Law and the policies established by Peace Officer Standards & Training ("POST") – the agency charged with training law enforcement officers in the State of Utah. (App. 93).

Three days after the shooting, the State Crime Lab was the first agency to rule in Officer Joseph's favor concluding he was "justified" in his use of deadly force. In spite of that determination, the City pushed the district attorney's office to file charges against Officer Joseph for aggravated assault – an act that is highly irregular against one of its own. (App. 77). In the city's presentation of the case to the district attorney, officials deliberately withheld critical relevant and reliable facts to suggest probable cause against Joseph existed when it did not. (App. 73-76). A few months later though, once the truth was revealed to the district attorney's Ernie Jones, he recommended discontinuing pursuit of prosecution declaring that Officer Joseph acted reasonable under the circumstances he was confronted.[3] (App. 77).

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3 See, e.g., *Tennessee v. Garner*, 105 S. Ct. 1694 (1985) (The use of deadly force, apprehension by use of

The D.A. allegedly based its decision on the State Crime Lab report, which the city had purposefully withheld initially. (App. 77). Meanwhile, contrary to the findings of both the State Crime Lab and the district attorney's office, the city insisted on taking administrative action against Officer Joseph any how, since criminal prosecution failed. (App. 24). At the advice of the city attorney's office, the chief reversed Officer Joseph's former termination and modified it to a 20-day suspension. (App. 14). He also issued an ultimatum mandating Officer Joseph to undergoing a second fitness for duty examination with one of its own doctors.[4]

Officer Joseph agreed to undergo the evaluation and immediately scheduled an interview with Dr. David L. McCann because he was warned that to refuse would be insubordination. The evaluation to place on or about February 3, 2000. Ironically, this was the second evaluation. The first evaluation was conducted by Michele Myers, an LCSW, just following the March 26th shooting as required by all officers who are involved in a critical incident shooting. (App. 65-66). That evaluation resulted in a "fit" finding. It was this second evaluation, the Dr. McCann diagnosis, which was requested contrary to policy. Dr. McCann's evaluation

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deadly force, and reasonableness of its use) *Graham v. Connor*, 109 S. Ct. 186 (1989) (Seizure under the Fourth Amendment – The reasonableness of the use of deadly force must be judged from the perspective of a reasonable officer at the scene and not with 20/20 vision of hindsight).

4 In a taped meeting, the chief informed Officer Joseph that the decision to alter his discipline and send him for the evaluation was posturing by city attorney against Officer Joseph's claimed civil rights lawsuit. The chief warned Officer Joseph not to pursue his appeal to civil service, and the chief assured Officer Joseph that if he dropped the matter, he would protect Officer Joseph's career with the department.

was schemed as an alternate means to get rid of Officer Joseph. During the evaluation, Dr. McCann focused primarily on Officer Joseph claims of civil rights violations – not the shooting incident itself. Interestingly, the police chief told Officer Joseph on January 5, 2000 not to go through with the appeal; not to pursue his civil rights case against the City. The chief called it posturing by the city attorneys and with 20/20 hindsight it would appear he wasn't lying. Ever since that time, not only has Officer Joseph had to fight to even gain employment but has had to even defend even his very name and reputation generally. The City engineered this case against Officer Joseph on a supposition that he was crazy.[5] The constant attacks on Officer Joseph has grown now to a "pattern of racketeering activity" violating the RICO Act, 18 U.S.C. § 1961.[6]

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5 That has been the beauty of the City's strategy. Fictitious claim Officer Joseph to be crazy and publicize it so that every time Officer Joseph claim corruption it sounds paranoid. However, let it be clear for the record that there is not one fact alleged herein that is either not supported by documentary evidence or by an admission on tape. Officer Joseph was warned by a source within the department "Watch your back . . . there out to get you." So Officer Joseph documented the City's actions against him from the start.

6 As incredible as it sounds, the Court is requested to pay special attention to the fact that the City Attorney's Office has caused the findings of the civil service commission to be unreliable because Martha Stonebrook acted as both prosecutor for the City and as legal adviser to the commission (a body of three lay commissioners), both in court and behind the scene – creating an appearance of impropriety and an obvious conflict of interest. Her conduct became more broadened and more corrupt rising to level of an obstruction of justice claim in violation of 18 U.S.C. § 1512(b), but that is being addressed in the U.S. District Court, District of Utah, *Robert Joseph v. DeeDee Corradini*,

Ironically, the City's campaign of harassment against Officer Joseph began because he openly objected to former Chief Ruben Ortega's mismanagement and grandstanding of an unrelated shooting in January 1999. Since Salt Lake City Mayor DeeDee Corradini was leaving office and Chief Ortega wanted to run for mayor. Chief Ortega viewed Officer Joseph's March 26, 1999 "justified" critical incident shooting as an opportunity to destroy Officer Joseph's credibility before Officer Joseph could impair the chief's chances for office. Even though the chief later changed his mind, the harassment and retaliation continued against Officer Joseph in a constant struggle to avoid civil liability.

II. Course of the Proceedings:

The police chief delivered Officer Joseph the modified 20-day suspension letter on January 3, 2000. (App. 14). Because the suspension was intended to be "posturing by the city's attorneys"[7] to avoid Officer Joseph's civil rights lawsuit, rather than for discipline of an otherwise unjustified conduct, Officer Joseph appealed the suspension on January 7, 2000, to the civil service commission despite the chief's January 5th warning not to do it.

Thereafter, Officer Joseph submitted to a tape-recorded 45 minute diagnostic interview with Dr. David McCann, M.D., F.A.P.A. The interview addressed on Officer Joseph's claims of civil rights violations only concerning the baseless pursuit of criminal charges against Officer Joseph for aggravated assault when in actuality Officer Joseph was "justified" in his use of deadly force. (App. 71, 79-86). During the McCann interview Officer Joseph's tape-recorder fell out of his pocket and the interview was

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case no. 2:00 CV-0340 K.

7 As explained in a January 5, 2000 tape-recorded conversation between Officer Joseph and the chief, the urged Officer Joseph to drop his civil rights complaint.

abruptly terminated. (App. 19, 53). Dr. McCann never completed the process. Nevertheless, Dr. McCann prepared a report and submitted it to the City with "unfit for duty" findings with the recommendation to terminate his employment. (App. 4, 15-16, 21, 24). The findings are contrary to every other evaluation prepared both before and after Dr. McCann's, which even includes the shooting evaluation and a subsequent pre-hire evaluation. (App. 63-68). These opposing evaluations alone demonstrate the fictitiousness and corruptness of the McCann evaluation.

Nevertheless, relying solely on the McCann evaluation, Officer Joseph was discharged on March 31, 2000. In an attempt to shore up the termination, the acting chief referenced other irrelevant incidents in the termination letter from previously closed and unsubstantiated Internal Affairs files. (App. 24-25). It has now been uncovered that this termination letter was drafted by the City Attorney, Martha Stonebrook for the chief to execute.

Following the receipt of the termination letter, Officer Joseph had his legal counsel submit an appeal to the civil service commission. (App. 19). The City responded to the appeal on April 19, 2000. (App. 14). The City's response, also prepared by Martha Stonebrook, included a quotation of Dr. McCann's "unfit" findings in an apparent attempt to prejudice the commission and any other who came in contact with the response.[8]

Before the civil service commission, Ms. Stonebrook acted as both prosecutor for the City and as legal adviser to the

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8 Note that the response was not marked "Confidential" even though it contains individually identifiable health information. In a letter dated August 14, 2000, Ms. Stonebrook demonstrates in that letter to counsel in another proceeding that this information is confidential and yet throughout these proceedings not once has she attempted to protect Officer Joseph. (App. 4, 15).

commission. Ms. Stonebrook's cleverness ultimately caused a dismissal to result for an apparent discovery violation, even though Ms. Stonebrook had privity to agreements made in other proceeding with Gooch and Officer Joseph's other legal counsel which led to the purported discovery violation. (App. 4, 10, 12). The City took unfair advantage of Officer Joseph in this proceeding.

Nonetheless, Ms. Stonebrook obtained her order of dismissal. (App. 12). And on appeal the Utah Court of Appeals upheld the decision. (App. 4). Since the evidence of Ms. Stonebrook's conduct was not adequately preserved in the record before the commission, the Utah Court of Appeals would not consider the arguments raised by Officer Joseph in his brief, even though Officer Joseph attempted to supplement the record. (App. 26).[9]

Largely due to Ms. Stonebrook's intuitiveness, the Utah Court of Appeals relied heavily on the McCann "unfit" findings in making its decision and even included it in the opinion. (App. 4). The opinion, a published opinion, contains the "confidential" health information that never should have been made a part of the opinion. The information was included in the dicta and was irrelevant to the court's decision upholding a dismissal on procedural grounds alone.[10] The court never should have included the disputed unfit

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9 Unfortunately for Officer Joseph, the City Attorney's Office and Ms. Stonebrook controlled the record – she exclusively decided what comprised of the record. Her control of the record led to a superficial upholding of the civil service commission and thus deprived Officer Joseph of a just and meaningful appeal.

10 Who could fault Judge Thorne though, upon an inspection of the record, also a public record, the City's response with the McCann findings is the first thing you read. The response, (app. 14) is highly suggestive and was strategically placed in the front of the record. Rather than

findings because Officer Joseph never had an opportunity to challenge its reliability before the commission below.

III. Disposition in Trial Court:

Contrary to the clear and plain reading of the law, Utah Code Ann. § 10-3-1012, mandates the civil service commission to "fully hear and determine the matter," the commission, at the advice of Ms. Stonebrook, took the first opportunity to avoid the merits of Officer Joseph's claims and dismissed Officer Joseph's appeal on procedural grounds. (App. 12). The outcome was the product of corruption–Officer Joseph was deprived of the opportunity to refute Dr. McCann's report.

Later, the Utah Court of Appeals upheld the dismissal and quoted Dr. McCann's fictitious diagnosis in its dicta. The dismissal for a procedural violation did not require any public disclosure of such damaging, controversial individually identifiable health information. The decision to include the McCann "unfit" quotation was an unwarranted intrusion upon Officer Joseph's privacy rights and the findings should have been protected from the public-at-large.

REASON FOR GRANTING THE PETITION

Certiorari Should Be Granted In This Case Under The Scheme Created Under The Rooker-Feldman Doctrine Because Until Now The State Court's Have Refused To Consider A Federal Question Concerning The Wrongful Disclosure Of Health Information.

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placing the document in chronological order as would be expected.

A. Introduction.

The statutes relevant to this Petition that Officer Joseph believes the Utah Court's have overlooked or misapprehended are as follows:

> 10-3-1012. Suspension or discharge by department head - Appeal to commission - Hearing and decision.
>
> (1) All persons in the classified civil service may be suspended as provided in Section 10-3-912, or removed from office or employment by the head of the department for misconduct, incompetency, failure to perform duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission.
>
> (2) Any person suspended or discharged may, within five days from the issuance by the head of the department of the order of suspension or discharge, appeal to the civil service commission, which shall fully hear and determine the matter.
>
> (3) The suspended or discharged person shall be entitled to appear in person and to have counsel and a public hearing.
>
> (4) The finding and decision of the civil service commission upon the hearing shall be certified to the head of the department from whose order the appeal is taken, and shall be final and immediately enforced by the head.

Utah Code Ann. § 10-3-1012 (1999). (Emphasis added).

> 10-3-1012.5. Appeal to court of appeals - Scope of review.
>
> Any final action or order of the commission may be

> appealed to the Court of Appeals for review. The notice of appeal must be filed within 30 days of the issuance of the final action or order of the commission. The review by Court of Appeals shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority.

Utah Code Ann. § 10-3-1012.5 (1999). (emphasis added).

In interpreting and applying either of these statutes the Courts should have followed its own long-standing policy. The Utah Supreme Court policy for construing statutory construction has recently been reiterated in *Lyon v. Burton*, 5 P.3d 616 (Utah 2000). The court stated, "[W]here the statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent." *Id.* (quoting, *Horton v. Royal Order of the Sun*, 821 P.2d 1167, 1168 (Utah 1991). It is clear in reading either Section 10-3-1012 or 10-3-1012.5, there is nothing ambiguous about their language. Its quite clear and yet neither court addressed Officer Joseph's appeal in light of the statutes. Either state court should have reversed the decision of the civil service. All one has to do is compare the commissions's December 16, 2000 findings and conclusions (App. 12) to the chief's January 3, 2000 suspension letter to see the obvious disregard for Section 10-3-1012. See Petition (no. 1).

B. The Commission Failed To Follow the Clearly Established Law In Utah.

Pursuant to Utah Code Ann. § 10-3-1012 (1953, as amended), the civil service commission is without broad discretion; the power conferred upon the commission to "fully hear and determine the matter" gives the commission the authority to determine whether the suspension of a police officer by the chief is appropriate for the alleged conduct of the officer. Any deviation of this scheme is beyond the authority of the commission constituting

an abuse of discretion. Controlling authority over the case at hand, the Utah Supreme Court has held that substitution of a suspension for six months without pay, in lieu of dismissal, is beyond the power of the commission. *Vetterli v. Civil Serv. Comm'n*, 106 Utah 83, 145 P.2d 792 (1944). Comparatively, the commission in this matter likewise acted beyond its authority, it cannot draw conclusions different than that of the chief. Nevertheless, in this case the commission did depart from the basis of the chief's decision when it looked for any basis to upheld the decision.

In this matter, when the case was presented to the Utah Court of Appeals, Officer Joseph argued two central points: (1) the decision of the commission exceeded the scope of its authority when it upheld the chief's decision beyond the reasoning expressed previously by the police chief; and (2) Officer Joseph claimed that the commission failed its duty to allow him a *fair and impartial hearing* because of the city attorney's conduct throughout the proceedings (where Ms. Stonebrook acted as both prosecutor for the city and as the commissioner's legal adviser). Ms. Stonebrook had an undue influence over the commission causing an appearance of an impropriety. Her ultimate decision to cause a dismissal for Officer Joseph's failure to provide one tape to her was in disregard for the truth. The truth is that she was privy to a conversation between counsel one week prior, all in agreement, that contradicted this commission's discovery order. Ms. Stonebrook had a duty to disclose that agreement to the commission. Instead, Ms. Stonebrook to advantage of that agreement and used it against Officer Joseph for the sole purpose of obtaining an unjust dismissal. Naturally, it came as no surprise being the Salt Lake Civil Service Commission that it ruled in favor of the City. (App. 12).

Meanwhile, in the Utah Court of Appeals' decision, the court avoided ruling in favor of Officer Joseph claiming his failure to participate in discovery is a classic case of undue influence, prejudice, unclean hands and thus, violation of due process of law. In this matter, the City had an unfair control over the civil service commission being its legal adviser and the prosecutor before it.

(App. 97). The City, while having unclean hands concerning its failure to provide discovery itself took unfair advantage of a missing tape requested in discovery to cause a dismissal for supposedly failing to participate in discovery, when in reality, Ms. Stonebrook was privy to an alternate arrangement concerning *all* of Mr. Joseph's tapes. (App. 48-50).

Nevertheless, nothing, that is nothing, in the course of the case excuses the City for its failure to protect Officer Joseph concerning his private health information. In this matter, the City was aware that Officer Joseph's Internal Affairs, health information, and personnel files were classified "confidential." (App. 69). And yet, in review of the file, Ms. Stonebrook, the City, did little to protect the information from wrongful disclosure to the public at large. Ms. Stonebrook authored the March 31, 2000 termination letter for acting chief Connole which included *all* of his Internal Affairs information (whether founded or unfounded). (App. 24). Ms. Stonebrook's response to the civil service commission included the controversial health information, which should have been referenced to and provided as a sealed document. (App. 14). And the City has quoted the information in a number of documents since before the Utah Court of Appeals including to oppose Officer Joseph's Motion For Relief Of Judgment. (App. 32). Ultimately, their repeated reference to the Dr. McCann's diagnosis prejudiced the Utah Court of Appeals. On July 26, 2002, the Utah Court of Appeals issued its Opinion. In that Opinion, the first thing the Court quoted was the McCann assessment. (App. 5). The McCann assessment was a hotly disputed fact before the commission. Officer Joseph claimed the health information was fictitious and was maliciously stated, and could prove it because he tape-recorded the doctor's interview, also because he has been assessed by objective health care providers both before and after Dr. McCann who all contradict Dr. McCann's assessment, (app. 63-68), and because the City's former psychologist, Dr. Eric Nielson, was available to testify that he was discharged by the City for refusing to recommend termination of an officer who he believed was "fit for duty" but the City wanted him to go too.

Nevertheless, the Utah courts apparently overlooked or misapprehended Utah Code Ann. § 10-3-1012's plain language in rendering their decision–the statute plainly limits the commission's authority to conducting a full hearing only. It may not alter or deviate from the chief's initial determinations. As a civil service employee, a police officer is entitled to Due Process under both the federal constitution and this section, by way of oral or written notice of the charges, an explanation of the employer's evidence, an opportunity to respond to the charges in "something less" than a full evidentiary hearing before termination, coupled with a full post-termination hearing "at a meaningful time." *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746 (Utah Ct. App. 1997). In other words, the commission may only uphold the chief or overrule him, and any departure from this scheme would deprive the officer of his substantive due process for failure to provide him with an opportunity to prepare and defend the accusations in a timely and meaningful manner. *Id.* In this matter, the scheme was not followed. There was no written rule concerning discovery or sanctions for discovery violations. The City made them up as it went along.

Nevertheless, when Officer Joseph personally spoke with Ms. Stonebrook, the commission's legal adviser, she informed him that if he did not provide her with a copy of his tape-recording of Dr. McCann, he would be precluded from using it; she never told him that she would have the appeal dismissed. (App. 10, 12). The decision to dismiss the appeal before the commission was arbitrary and in complete disregard to Ms. Stonebrook's notice to Officer Joseph. These are the types of errors the Due Process Clauses aimed to guard against.

In this matter, the police chief initially discharged Officer Joseph allegedly for acting beyond the scope of the city's deadly force policy, then changed its reasoning to be that of being unfit for duty. (App. 24). This second discharge letter was drafted by Ms. Stonebrook – the decision was a Risk Management decision; Salt Lake City Corporation is self-insured.

On appeal to the civil service commission, the commission deviated from addressing the merits of the "chief's decision," and followed Ms. Stonebrook's lead to dismiss the matter for an allegedly discovery violation. (App. 12). Ms. Stonebrook led the commission into abusing its statutory discretion. *Cf. Vetterli*, supra.

Because of the commission's violation, pursuant to Utah Code Ann. § 10-3-1012.5 (1953, as amended), upon a review of the record, this Court should have ruled that the commission "abused its discretion or exceeded its authority." Section 10-3-1012.5 is so clear on its face that it could only lead one to believe that the Utah Court of Appeals overlooked or misapprehended the law. Certainly, the city could not prevail if it listened to Officer Joseph's case on the merits. The commission, if it had acted impartial, or if it was law trained and did not follow Ms. Stonebrook's self-serving advise, would not have dismissed Officer Joseph's appeal; it would have reversed the chief's decision.

C. Regarding Administrative Agencies, Utah's Scheme Is Similar To The Federal Scheme Explained In *Chevron*.

In this matter, the Utah Court of Appeals failed to follow stare decisis concerning an agency's interpretation and application of law. In this matter, the Utah Administrative Procedures Act (the "UAPA") was tailored after the Federal Administrative Procedures Act (the "APA"). Coincidentally, state case law concerning the UAPA has developed similarly to this Court's interpretations in the federal system. *See Salt Lake City Corporation v. Confer*, 674 P.2d 632, 636 (Utah 1983); *Morton Int'l v. Auditing Div. of Utah State Tax Comm'n*, 814 P.2d 581, n. 43 (Utah 1991) ("The United States Supreme Court has recently adopted a similar approach." citing *Dole v. United Steelworkers of America*, 494 U.S. 26, 110 S. Ct. 929, 938, 108 L. Ed. 2d 23 (1990); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 841, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

Under both *Confer* and its progeny concerning the UAPA[11] and *Chevron* and its progeny concerning the APA, the Courts have both declared that the administrative agency is given no deference in interpreting the law it has been delegated when the statute and the legislative intent is not ambiguous. In this matter, pursuant to Section 63-46b-2(b) of the UAPA, the Civil Service Commission is an administrative agency for the City of Salt Lake, a political subdivision of the State of Utah pursuant to Utah Code Ann. § 10-1-201 (1953, as amended). The commission's authority is controlled by the UAPA and the case law concerning the UAPA is applicable to this matter.

In this matter, the authority of the Salt Lake City Civil Service Commission is very limited. Pursuant to Section 10-3-1012, after a decision has been made by the police chief concerning a suspension or discharge of an officer, upon appeal to the commission, the commission "shall fully hear and determine the matter." The commission lacks any deference to deviate from the reasoning specified by the chief and to dismiss the appeal on other grounds. In this case, Ms. Stonebrook, admittedly legal counsel and the legal adviser for the commission in this matter exercised an undue influence over the commission, and inappropriately obtained a dismissal on a discovery violation claim when in fact she had failed to comply with discovery on numerous occasions and even was privy to an alternative discovery agreement with other counsel in the related civil rights action.

In this matter, the Utah Court of Appeals erred by not following stare decisis. Earlier this past month, the Utah Supreme Court reiterated the importance of stare decisis in *State v. Mauchley*, ____ P.3d ___, 470 Utah Adv. Rep. 31 (Utah Supreme Court, April 1, 2003). Associate Chief Justice Durrant opined:

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11 Utah Code Ann. § 63-46b-1 (1953, as amended) et seq.

> The doctrine of stare decisis is crucial to our system of justice because it ensures "predictability of the law and the fairness of adjudication."

Id., at 32 (quoting *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993). This principle follows the well-settled practice established by this Court which was incorporated from the common law courts of England. *See, e.g., Marbury v. Madison*, 1 Cranch 137 (1803). The principles of impartial judicial review and stare decisis are at the core of Due Process, the Law of the Land, which have grown from the Magna Carte.

This Court should grant certiorari. The petitioner requests that this Court restore justice where the Utah appellate courts have allowed their hands to be tied by a defective record and other improprieties caused by the bias of the Salt Lake City Civil Service Commission. This bias was caused by Ms. Stonebrook acted as both prosecutor and legal adviser for the lay commission. The process allowed her to exercise an unfair advantage over Officer Joseph throughout the proceeding. Officer Joseph attempted to append the record on appeal to the Utah Court of Appeals. (App. 26). That court refused. He also attempted to point out the bias of the City Attorney's Office. (App. 32). The Court ignored him. Officer Joseph appealed his discharge claiming the Dr. McCann evaluation was fictitious. (App. 19). The order of dismissal issued by the commission never addressed the merits. (App. 12). The Utah Court of Appeals upheld the dismissal, but also inappropriate published the controversial health information quoted from Dr. McCann's alleged diagnosis. (App. 5). That public disclosure was an egregious error and violation of Officer Joseph's privacy rights concerning individually identifiable health information – a clear violation of the Fourteenth Amendment. This Court should correct the error. The publication of individually identifiable health information, especially knowingly fictitious health information never should have been published in the manner that the court endeavored. The commission never reviewed Officer Joseph's claim on the merits concerning the McCann evaluation. The

dismissal was for procedural a violation. (App. 10).

D. Office Joseph's "Justified" Conduct Entitled Him To Qualified Immunity.

In this matter, Officer Joseph's conduct was objectively determined "justified" by several persons in various forums. (App. 71, 87, 93). The exception has been the Salt Lake Civil Service Commission which was under the exclusive control of the Ms. Stonebrook. The commission has been the only forum which has ruled against Officer Joseph. The irony of the commission's decision is that it upheld both disciplinary actions against Officer Joseph – one of the department's own officers – for his "justified shooting."[12] In essence, ignoring the fact that no wrong-doing occurred. The City completely failed to appreciate the fact that Officer Joseph was determined to have acted in "self-defense." It is well-settled that acts of self-defense are void in law, justified conduct. In Utah, this maxim is codified under Section 76-2-402.

In reviewing this doctrine, we examine its origins in American Jurisprudence. Sir William Blackstone said,

> Both the life and limbs of a man are of such high values, in the estimation of the law of England, that it pardons even homicide of committed *se defendendo*, or in order to preserve them. For whatsoever is done by a man, to save either life or member, is looked upon as dome upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; there, though accompanied with all other the requisite solemnities, are totally void in law, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient

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12 See Petition for Writ of Certiorari (No. 1)

> excuse for the commission of many misdemeanors, as will appear in the fourth book.

Commentaries on the Laws of England, (Vol. I), William Blackstone (1772), at 126. In a §1983 wrongful death suit, the U.S. district court of Utah in *Singer v. Wadman*, 595 F. Supp. 188 (D. Utah 1982), determined that officers conduct "justified" pursuant to Section 76-2-402 entitled officers to immunity even though they clearly used deadly force in their attempts to cause an arrest. The Court even dismissed the plaintiff's claim for intentional or reckless infliction of emotional distress relying on the Restatement (Second) of Torts § 46. That section reads:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.
>
> Section 46 "creates liability only where the actor intends to invade the interest in freedom from severe emotional distress." Id. § 47, Comment a.
>
> It has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of

> aggravation which would entitle the plaintiff to punitive damages for another tort.
>
> Id. § 46, Comment d.

Id., at 298.

In this matter, Ms. Stonebrook prosecuted Officer Joseph for his use of force contrary to the fact that his conduct was "justified." Because Officer Joseph's conduct was legally, "justified," he was immune from civil liability barring criminal, civil, and administrative proceedings against him. When it became apparent to the City Attorneys that a discharge for the shooting incident would expose the City itself to liability, the City Attorneys devised a scheme to have Officer Joseph submit to a fictitious evaluation by Dr. McCann, who consequently was part of the scheme. The evaluation was a clear set up which is obvious when compared to other evaluations. (App. 63-68). Moreover it is clear that the evaluation is fraudulent and fictitious when you understand that in order to diagnose the so-called personality disorder Dr. McCann purports, he would have to do more than a 45 minute interview with Officer Joseph; Dr. McCann would have to uncover a well documented history of problems, including with the law forming from early adolescence. In this case, Dr. McCann failed to even complete his interview, let alone take other historical factors into account. Just put simply, Dr. McCann served the bidding of the City's commands without reservation or hesitation. They wanted Dr. McCann to hang Officer Joseph, and a lynching is what they received.

In this matter, Officer Joseph requests this Court to accept this appeal. This Court needs to set the record straight. When a police officer shoots a criminal in clear self-defense, (app. 71, 87), the act is void – in good faith, the officer is immune from prosecution, whether criminal, civil or administrative. No action against the officer can or should happen for any reason, under any theory. At the time of the shooting, this officer, Officer Joseph, had

an impeccable police record, he received great performance evaluations, he earned the respect of his peers, and the only reason why the City acted against him is in retaliation for speaking out against the department after the baseless prosecution was dismissed, at his attorney's press conference (App. 77). Clearly the press conference was privileged under the First and Sixth Amendments because they related to litigation.

E. Officer Joseph's Personal Health Information Is Protected By Federal Law.

In this matter, the City has and continues to wrongfully disclose Officer Joseph's Identifiable Health Information in violation of the Health Information Portability and Accountability Act of 1996 and 45 C.F.R. § 164.500 (hereinafter, the "Act"). In this matter, the quoted health information obtained from Dr. McCann's report[13] and the individually identifiable health information contained therein has been repeatedly, wrongfully disclosed by the City to other persons in a relentless effort to discredit and prejudice Officer Joseph.

The Act defines *individually identifiable health information* as:

> "(6) INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION.--The term 'individually identifiable

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13 Under the Act, Officer Joseph challenges the validity of report. Apparently, Dr. McCann has violated §1035 of the Act wherein it prohibits any person, who knowingly and willfully "(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry in connection with the delivery of [health care services]."

> health information' means any information, including demographic information collected from an individual, that--
>
> "(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> "(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and--
>
> "(i) identifies the individual; or
>
> "(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

Id. at § 1171; *see also* 45 C.F.R. § 164.500.

Throughout this proceeding, the City has used Officer Joseph's identifiable health information publicly against him. First, it was used to support his second discharge and a copy of his health information was provided to the media in connection with his case. Secondly is was quoted verbatim in the City's response to Officer Joseph's Appeal to the commission. (App. 14). Then it was filed verbatim in the Utah Court of Appeals to oppose Officer Joseph's motion for relief of judgment. (App. 32). These wrongful disclosures resulted in the Utah Court of Appeals publishing the health information in Officer Joseph's published opinion. (App. 5). Officer Joseph attempted to correct the court of appeals by requesting it to redact the information in a petition for rehearing. The court denied the request. He then requested the Utah Supreme Court to correct the court of appeals, it too denied the request.

Meanwhile, the Act at § 1177 specifically criminalizes knowing and willful disclosures of identifiable health information. Section 1177 reads:

"WRONGFUL DISCLOSURE OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION

(a) OFFENSE.-- A person who knowingly and in violation of this part--

"(1) uses or causes to be used a unique health identifier;

"(2) obtains individually identifiable health information relating to an individual; or

"(3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b).

"(b) PENALTIES.-- A person described in subsection (a) shall--

"(1) be fined not more than $50,000, imprisoned not more than 1 year, or both;

"(2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and

"(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

Id. Its obviously from a review of the appendices in this case, that whenever a neutral body hears the facts of Officer Joseph's claims, he prevails. (App. 76, 87, 93). The only tribunal which ruled against Officer Joseph was the commission, but as the appendices clearly show Ms. Stonebrook led the commission to its adverse rulings acting as both prosecutor and as legal adviser to the commission. She admits it in a recent affidavit in Officer Joseph's RICO Conspiracy case now pending. (App. 97). Needless to say, at this point, Officer Joseph can clearly show the City's attempt to cause Officer Joseph malicious harm. *See Id.* at § 1177(b)(3).

Historically, the purpose of this section of the Act was to prohibit the abusive practices engaged by employers and by certain parties in the insurance industry. In this matter, the City is both Officer Joseph's employer and it is self-insured. Obviously, its motivation was clear to start with. The City Attorney's Office acting as the Risk Management, initiated a liability guarded decision rather than settle up with Officer Joseph's baseless prosecution civil rights claim. Unfortunately, for the Salt Lake community at large, this was the wrong decisions – the citizens should have confidence in their local government.

It is clear from a review of this case that Officer Joseph's claims of corruption are genuine. (App. 77). It is also clear that Officer Joseph has a valid grievance against the State of Utah and the City for its falsification and wrongful public disclosure of his identifiable health information. (App. 4).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L. Joseph
Petitioner Pro Se

Address:
Robert L. Joseph
1156 Lost Eden Drive
Sandy, Utah 84094
(801) 571-3098

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 21, 2003

Mr. Robert L. Joseph
1156 East Lost Eden Drive
Sandy, UT 84094

Re: Robert L. Joseph
v. Salt Lake City Civil Service
Commission, et al.
Application No. 02A699

Dear Mr. Joseph:

The application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case has been presented to Justice Breyer, who on February 21, 2003, extended the time to and including May 19, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K, SUTER, Clerk

By

s/
Gail B. Johnson
Assistant Clerk

App. 2

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - ooOoo - - -

Robert L. Joseph,	)	
Petitioner,	)	No. 20020836-SC
	)	20010399-CA
	)	
v.	)	
	)	
Salt Lake City Civil Service	)	
Commission, Salt Lake City	)	
Corporation, Salt Lake City	)	
Police Department, and the	)	
Chief of Police,	)	
Respondents.	)	

- - - - -

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed pursuant to Rule 48, of the Utah Rules Appellant Procedure.

IT IS HEREBY ORDERED that the Petition for Writ of Certiorari filed on October 16, 2002, by petitioner is denied.

FOR THE COURT:

December 20, 2002 s/

Christine Durham
Chief Justice

App. 3

IN THE UTAH COURT OF APPEALS

- - - oo0oo - - -

Robert L. Joseph,	)	OPINION
	)	(For Official Publication)
Petitioner,	)	
	)	Case No. 20010399-CA
v.	)	
	)	FILED
Salt Lake City Civil Service	)	(July 26, 2002)
Commission, Salt Lake City	)	
Corporation, Salt Lake City	)	2002 UT App 254
Police Department, and the	)	
Chief of Police,	)	
	)	
Respondents.	)	

- - - - -

Original Proceeding in this Court

Attorneys: Robert L. Joseph, Sandy, Petitioner Pro Se
Martha S. Stonebrook, Salt Lake City, for Respondents

- - - - -

Before Judges Billings, Greenwood, and Thorne.

THORNE, Judge:

¶ 1 Robert L. Joseph appeals from a finding of the Salt Lake City Civil Service Commission (the Commission) dismissing his administrative appeal following his repeated failure to comply with discovery requirements. We affirm.

BACKGROUND

¶ 2 In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City)

determinating that he had acted unprofessionally and had violated the City's deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who, in March of 2000, submitted to the City the following conclusions regarding Joseph:

> [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and in other incidents. Officer Joseph's personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors.
>
> His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to other City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.

Based on at least in part on this evaluation, on March 31, 2000, the City's Chief of Police, Mac Connole, terminated Joseph's employment. Joseph appealed the City's decision to terminate his employment to the Commission.

¶ 3 Soon after learning of the appeal, the City requested certain documents and materials known or suspected to be in Joseph's possession. Joseph, however, neither proffered the requested discovery materials nor did he petition the Commission for protection from the request. Over the course of the next ten months, the City repeatedly renewed its request, which Joseph ignored on every occasion. Frustrated with Joseph's refusal to cooperate, the City filed a motion to dismiss as a sanction for Joseph's inaction. This finally roused Joseph to act.

¶ 4 To stave off possible dismissal, Joseph, through counsel, entered into a stipulation with the City. Joseph agreed to supply <u>all</u> the

requested material within fifteen days or face renewal of the dismissal motion, likely ending his appeal. Following a hearing on the proposed agreement, the Commission adopted the stipulation and specifically informed Joseph's attorney that failure to comply with the clear terms of the agreement would result in his appeal being dismissed with prejudice. Nonetheless, Joseph failed to timely produce the requested material, thereby violating the terms of the stipulation.

¶ 5 The City subsequently renewed its request for dismissal, which the Commission readily granted on April 9, 2001. Then, after a hearing on Joseph's motion to strike the order of dismissal, the Commission found that Joseph had presented no good cause to explain his failure to comply with the terms of the stipulation and denied his motion. Joseph now appeals.

ISSUE AND STANDARD OF REVIEW

¶ 6 While Joseph submits several arguments for our review, only one is properly before this court.

¶ 7 Joseph argues that the Commission erred in dismissing his appeal as a discovery sanction. We will reverse an adjudicative body's decision to levy discovery sanctions only in the face of a clear abuse of discretion. See Hales v. Oldroyd, 2000 UT App 75, ¶ 15, 999 P.2d 588.

ANALYSIS

¶ 8 Prior to addressing Joseph's claim we must first determine whether this court is properly vested with jurisdiction over his claim. While we are generally limited in our authority to address issues sua sponte, see In re R.N.J., 908 P.2d 345, 347 (Utah Ct. App. 1995) ("if a [party] has not raised an issue on appeal, we may not consider the issue sua sponte" (quoting State v. Rodriguez, 841 P.2d 1228, 1229 (Utah Ct. App. 1992)) (alteration in original)), when the issue is jurisdictional we are under no such limitation. See id. "[T]he jurisdiction of the Court of Appeals . . . must be provided by statute." DeBry v. Sat Lake County, 764 P.2d 627, 627 (Utah Ct. App. 1988) (citing Utah Const. Art. VIII, § 5). In the absence of a specific statute granting this court jurisdiction over the subject matter, we have no

jurisdiction. See Barney v. Division of Occupational & Prof'l. Licensing, 828 P.2d 542, 543-44 (Utah Ct. App. 1992) ; DeBry, 764 P.2d at 628.

¶ 9 Here, were we restricted to the jurisdictional boundaries found in Utah Code Ann. § 78-2a-3(2) (b)(I) (Supp. 2001) (granting this court jurisdiction over appeals from the district court's review of "adjudicative proceedings of agencies of political subdivisions of the state or other local agencies"), we would not have jurisdiction and would be forced to dismiss the petition. See Barney, 828 P.2d at 544. However, Utah Code Ann. § 10-3-1012.5 (1999) provides an express grant of jurisdiction to this court for the specific purpose of reviewing decisions made by municipal commissions.[1] Therefore, because the Legislature has provided a specific statute granting this court jurisdiction, we conclude that we have jurisdiction and address Joseph's claim on appeal.

¶ 10 Joseph first argues that the discovery sanction levied by the Commission violates his due process right to a full and fair hearing before the Commission. "Post-deprivation procedures, while not constitutionally guaranteed, must comport with due process requirements providing for a fair hearing." Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 753 (Utah Ct. App. 1997). "'The fundamental requirement of due process is the opportunity to be heard, at a meaningful time and in an meaningful manner, and, when this opportunity is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process.'" Utah Dept. Of Trans. v. Osguthorpe, 892 P.2d 4, 8 (Utah 1995) (citation omitted). Moreover, while local administrative bodies are not strictly bound by the formal rules governing discovery, are clearly applicable to such proceedings. See Utah R. Civ. P. 81 (a).

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1 note that while Utah Code Ann. § 10-3-1012.5 (1999) is titled "Appeal to district court–scope of review," its plain language vests jurisdiction over "[a]ny final action or order of the [municipal] commission" in this court.

¶ 11 When an administrative agency determines that a party has not complied with legitimate discovery requests due to "'willfulness, bad faith, ...fault, or persistent dilatory tactics frustrating the judicial process,'" the agency acts within its discretion in imposing sanctions. Hales v. Oldroyd, 2000 UT App 75, ¶ 16, 999 P.2d 588 (citation omitted). "'[T]he choice of an appropriate discovery sanction [including the entry of default against the noncomplying party] is primarily the responsibility of the [agency],'" and "we have long held that we will not interfere [with this choice] unless "'abuse of that discretion [is] clearly shown.'" Morton v. Continental Baking Co., 938 P.2d 271, 274 (Utah 1997) (citations omitted) (fifth alteration in original).

¶12 Joseph argues that the meaning behind "the opportunity to be heard, at a meaningful time and in a meaningful manner," Osguthorpe, 892 P.2d at 8, in this context, immunizes him from dismissal, regardless of his conduct. He is correct. While we agree that Joseph has a statutory right to a post-deprivation hearing, see Utah Code Ann. § 10-3-1012 (1999); Lucas, 949 P.2d at 753, this right, absent contrary rules adopted by the Commission, is tempered by the petitioner's duty to comply with, or at least respond to, a properly issued discovery request. Should the petitioner fail in this duty, and the Commission determine that the failure was the product of "willfulness, bad faith, ...fault, or persistent dilatory tactics," Oldroyd, 2000 UT App 75 at ¶ 16, the Commission may, at its discretion, levy sanctions for the failure, including dismissal.

¶ 13 Here, there is no question that Joseph failed to comply with the city's repeated discovery requests. Joseph ignored at least seven request from the City over the course of ten months. Then, in the face of the City's motion to dismiss, Joseph essentially admitted fault in failing to produce the requested material, and acknowledged that dismissal would result should he fail again. Based on Joseph's subsequent failure to comply, and following Joseph's admission of fault, the Commission dismissed Joseph's appeal.

¶ 14 After reviewing the recording, we concluding that not only did Joseph stipulate to fault regarding his failure to comply with the requested discovery at the stipulation hearing, Joseph's attorney also admitted to being "somewhat dilatory" regarding the City's discovery requests. The Commission, therefore had an ample basis to justify

sanctioning Joseph for his continued failure to comply with the City's discovery requests. See Oldroyd, 2000 UT App 75 at ¶ 31; see also Osguthorpe, 892 P.2d at 8. Moverover, after accepting Joseph's initial acknowledgment of fault, the Commission chose to extend Joseph one final opportunity to comply. Joseph failed to avail himself of that opportunity. Accordingly, we conclude that the Commission did not violate Joseph's due process right to post-deprivation hearing.

¶15 Joseph next argues that the absence of a formal discovery order is determinative. However, an agency is not required to issue an order compelling discovery prior to considering sanctions. See Tuck v. Godfrey, 1999 UT App 127, ¶19, 981 P.2d 407. "'It is enough that a notice of the taking of a deposition . . . or a request for inspection has been properly served on the party.'" Id. (citation omitted). Furthermore, "[a]lthough parties deserve the opportunity to be heard, 'dismissal . . . is appropriate when a party pursues a claim in a manner that abuses that opportunity.'" Oldroyd, 2000 UT App 75 at ¶31.

¶16 There is no contention that the City failed to properly serve Joseph with any of its discovery request. Joseph, in fact, admits having received most, if not all, of the request. Joseph voluntarily entered into a stipulation with the City wherein he essentially admitted he was at fault for the failure to respond to the City's discovery requests. He further stipulated that any additional failure on his part would result in the renewal of the City's motion to dismiss. Additionally, both Joseph and his attorney were well aware that the Commission had adopted the stipulation and had entered an additional order dismissing Joseph's appeal should he fail to timely produce the requested discovery items.

¶17 After reviewing the record, we conclude that not only was Joseph properly served with several discovery requests, any one of which was sufficient to provide Joseph with the notice he argues he did not receive, but also that Joseph was fully aware of the specific penalty he faced should he again fail to comply with the City's discovery requests. Therefore, Joseph's second argument fails.

¶18 Joseph raises several other issues on appeal. However, because he failed to raise these issues with the Commission, we will

not address them here.[2] See State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346 (stating "[a]s a general rule, claims not raised before the trial court may not be raised on appeal"); Olroyd, 2000 UT App 75 at ¶24 (stating "'[a]ny challenges to the merits of a discovery request must be timely filed and put before the trial court, or the claim will be waived.'" (citation omitted)); Godfrey, 1999 UT App 127 at ¶24 (observing that a failure to raise an objection to a discovery sanction waives the objection).

¶19 Accordingly, we affirm the Commission's order dismissing Joseph's appeal.

s/
William A. Thorne Jr., Judge

¶20 WE CONCUR:

s/
Judith M. Billings,
Associate Presiding Judge

s/
Pamela T. Greenwood, Judge

---

2 Specifically, Joseph argues that the penalty of dismissal of his appeal was disproportionate to the conduct; that the Commission failed to consider any other reasonable sanction; that the discovery material requested by the City was irrelevant; and that the Commission's reliance on the advise of the City Attorney created a conflict of interest.

IN THE CIVIL SERVICE COMMISSION IN AND FOR SALT LAKE CITY, UTAH

Robert L. Joseph, Petitioner, v. Salt Lake City Corporation, Respondent.	*	**ORDER DENYING JOSEPH'S MOTION TO STRIKE ORDER OF DISMISSAL**

On April 19, 2001, Robert L. Joseph's "Motion to Strike Order of Dismissal and Allow Hearing to Go Forward" came before the Civil Service Commission. Joseph was represented by his counsel, Erik Strindberg. Salt Lake City Corporation was represented by its counsel, Assistant City Attorney Martha S. Stonebrook. The Commission reviewed the pleadings filed by both parties and heard oral arguments of counsel.

After hearing from counsel, the Commission, met in closed session to deliberate. Now, therefore, it is the unanimous finding of the Commission that Joseph and his attorney failed to comply with the Commission's March 15, 2001 Order by failing to provide all the discovery requested by Salt Lake City Corporation by the march 30, 2001 deadline established by the order if this Commission.

Based upon the above finding, and for good cause shown,

IT IS HEREBY THE ORDER OF THIS COMMISSION that Joseph's Motion to Strike the Order of Dismissal is denied and the April 9, 2001 Order dismissing Joseph's appeal with prejudice is upheld.

DATED THIS 23 DAY OF APRIL, 2001.

BY THE COMMISSION:

s/
Commissioner John E. Robertson
Chairperson of and for the Civil
Service Commission

IN THE CIVIL SERVICE COMMISSION IN AND FOR SALT LAKE CITY, UTAH

Robert L. Joseph, Petitioner, v. Salt Lake City Corporation, Respondent.	*	**ORDER OF DISMISSAL**

On March 15, 2001, this matter came before the Civil Service Commission on the parties Stipulated Motion to Continue Hearing Date and the City's Motion to Dismiss for failing to Cooperate with Discovery. Petitioner Robert Joseph ("Joseph") was represented by his counsel, Erik Strindberg. Salt Lake City Corporation was represented by its counsel, Assistant City Attorney Martha S. Stonebrook.

After hearing from counsel, the Commission, on its own initiative, entered an Order that in the event that Joseph failed to produce to the City all of the documents and items that it had requested by March 30, 2001, the Commission would dismiss Joseph's appeal.

On April 2, 2001, the City filed a Motion to Enforce the Order on the grounds that Joseph failed to produce all of the tapes requested by the City by 6:00 p.m. on March 30, 2001.

Therefore, based upon the March 15, 2001 Order of this Commission, and for good cause shown thereon,

IT IS HEREBY ORDERED THAT THE APPEAL FILED BY ROBERT JOSEPH IS DISMISSED WITH PREJUDICE.

DATED THIS 9TH DAY OF APRIL, 2001.

BY THE COMMISSION:

s/
Commissioner John E. Robertson
Chairperson of and for the Civil
Service Commission

RESPONSE TO REQUEST FOR APPEAL HEARING BEFORE THE SALT LAKE CITY CIVIL SERVICE COMMISSION

Respondent:

Salt Lake City Corporation
451 South State Street, Suite 505A
Salt Lake City, Utah 84111

Phone: 801-535-7788
Fax: 801-535-7640

Please state the action taken by the Respondent:

On July 16, 1999, Chief Ruben Ortega terminated Robert Joseph's employment with Salt Lake City Corporation because he felt that Joseph had violated the Police Department's deadly use of force policy. This violation, coupled with Joseph's employment history caused Chief Ortega to conclude that Joseph could no longer serve effectively as a Police Officer. Chief Ortega left office as Chief of Police on January 3, 2000.

On January 3, 2000, Chief Mac Connole reviewed all matters known to be relevant concerning Officer Joseph's employment termination. Based upon this review, Chief Connole amended the City's decision and reinstated Joseph, subject to (1) the finding that Joseph's use of deadly force was not within policy and (2) the imposition of a 20-day suspension without pay for the policy violation.

Chief Connole also required Joseph to submit to a fitness for duty examination with Dr. David McCann. Joseph's failure to pass the fitness for duty examination resulted in his termination from the Salt Lake City Corporation.

(The letter from Chief Connole terminating Mr. Joseph's employment is attached hereto).

Please provide facts or occurrences surrounding the appeal:

Dr. McCann's fitness for duty examination was based upon a clinical interview, a clinical information inventory, a mental status

examination, psychological testing and personnel records. After a thorough analysis, Dr. McCann rendered his conclusion that Joseph:

> "has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and in other incidents. Officer Joseph's personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors. His personality traits are likely to lead him to increasing isolation and alienation from appropriate professional supervision and the needs of citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to the officers and tot the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer."

On March 14, Chief Connole met with Joseph and his attorney to discuss the issues of his failure to pass the fitness for duty examination. Chief Connole gave due consideration to the points raised in that meeting. Chief Connole also gave consideration to Joseph's personnel history with the Salt lake Police Department. Chief Connole was not able to disregard Dr. McCann's medical conclusion that Joseph was unfit to remain as a police officer. Thus, Chief Connole terminated Joseph's employment as a police officer with Salt Lake City Corporation, effective March 31, 2000.

The Respondent believes that Dr. McCann conducted a complete and competent evaluation. Dr. McCann is noted psychiatrist and well acquainted with the psychological stressors and requirements encountered by law enforcement personnel and agencies. Dr. McCann relied upon well-recognized psychological tests to formulate, in part, his medical conclusion. His personal observations were made based on his training and expertise. Dr. McCann's contact with David Greer regarding the Union meeting did not invalidate Dr. McCann's examination nor does it constitute inappropriate action on the doctor's part. Specifically, Joseph executed a release on February 3, 2000 which specifically provides that Joseph "authorize[s] Dr. McCann to obtain information from any source or person he deems necessary to complete the report."

The Respondent denies that it is responsible for Mr. Joseph's psychological condition/disordered traits. Under the circumstances, the Respondent was justified in terminating Mr. Joseph's employment.

What records and other information do you request from the Appellant?

A copy of the tape recording(s) Mr. Joseph made of his interview(s) and examination(s) with Dr. McCann.

Copies of all tests, records, notes, diagnostic evaluations and materials prepared by Michelle Myers, LCSW.

Copies of all tests, records, notes, diagnostic evaluations and materials prepared by any mental heath care provider who has examined, interviewed, or counseled Mr. Joseph.

Copies of all exhibits that Joseph intends to use at the hearing of this matter.

Please list any witnesses you may have testify:

Chief Mac Connole
Dr. David McCann
Dr. Leslie M. Cooper
Officer David Greer
Sgt. David Cracroft
Sgt. David Askerlund
Officer Ron Bruno
Dr. Michael Roberts
Dr. Rand Lynn Hart

The above witnesses can be contacted through:
Salt Lake City Corporation
Attn: Martha S. Stonebrook
Office of the City Attorney
451 South State Street
Salt Lake City, Utah 84111
Phone; 801-535-7788

The Respondent may also call Deputy Billy Romero, Salt Lake County

Sheriff's Department. The Respondent also reserves the right to call any witness now listed or later identified by Mr. Joseph.

Dated this 19th day of April, 2000.

Respondent:

s/

By: Martha S. Stonebrook
Assistant City Attorney

Submit this document to the Secretary of the Salt Lake City Civil Service Commission, 451 South State Street, Room 115, Salt Lake City Utah 84111.

LAW OFFICES OF
SCALLEY & READING
A PROFESSIONAL CORPORATION

261 EAST 300 SOUTH
SECOND FLOOR
SALT LAKE CITY, UTAH 84111

May 3, 2000

Ms. Martha S. Stonebrook
Salt lake City Attorney's Office
451 South State
Salt Lake City, Utah 84111

Re: *Appeal of Termination of Officer Robert Joseph*

Dear Martha:

This correspondence is to follow up on our telephone conversation of April 26, 2000, wherein I requested Officer Joseph's pre-employment psychological testing so that I may hire an expert on his fitness for duty. While you said you could not get to it that day, you would get back to me on providing that information. I look forward to hearing from you at your earliest convenience.

Thank you for your assistance in this matter.

Sincerely,

SCALLEY & READING, P.C.

s/
Lisa A. Jones

cc: Robert Joseph

REQUEST FOR APPEAL HEARING BEFORE THE SALT LAKE CITY CIVIL SERVICE COMMISSION

Rob Joseph	Chief A.M. "Mac" Connole
Name of Applicant	Person who took action being appealed
1156 East Lost Eden Drive	Salt Lake City Police Department
Address (Street)	Department, if applicable
Sandy, Utah 84094	March 31, 2000
City, State, Zip Code	Date of Action

(801) 571-3098/
Phone: Home / Work

J. Bruce Reading
Appellate will be represented by

SCALLEY & READING, P.C., 261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Address: Street, City, State, Zip

What is the action that is being appealed:

Termination of Employment

Please provide the facts regarding your appeal: (Attach additional pages, if necessary):

Officer Rob Joseph's employment was terminated on March 31, 2000 because of a psychological evaluation finding him unfit for duty. Based upon that finding, Chief Connole claimed that Officer Joseph is incapable of performing his duties a police officer.

This appeal follows shortly after the appeal of Officer Joseph's suspension of 20 days from the SLPD force. Officer Joseph was fired following the shooting, but was reinstated with a 20-day suspension. The shooting incident occurred when Officer Joseph stopped a suspect who was speeding and driving under the influence of alcohol. Officer Joseph fired at the suspect after the suspect placed his vehicle in reverse causing the car door to strike Officer Joseph and

carry him backward. Officer Joseph fired his gun while on the vehicle, while being thrown from the vehicle as he fell to the pavement.

After this incident, Officer Joseph was interviewed by Michele Myers, and LCSW, and found fit to continue as a police officer.

Officer Joseph was criminally charged with aggravated assault by the Salt Lake County District Attorney on April 23, 1999. On November 23, 1999, the judge in the case dismissed the criminal action when the District Attorney agreed that Officer Joseph's Motion to Dismiss was well taken and decided not to oppose the motion.

Following his reinstatement, Officer Joseph underwent an evaluation as to his fitness to perform his duties. Officer Joseph has no knowledge of what issues were to be involved in the evaluation because he did not receive a copy of the instructions to the psychiatrist. As required by policy. Officer Joseph was interviewed by Dr. David L. McCann, a psychiatrist for the Department, to determine his fitness for duty. Officer Joseph was asked many questions during his interview with Dr. McCann regarding his court case, the incident in question and the police department's policies, but not about his mental and emotional state at the time of the shooting or any time thereafter. When speaking about Officer Joseph's actions at a union meeting, Officer Joseph said he had recorded the meeting and asked if Dr. McCann wanted to hear the tape to determine if he had acted in the manner alleged. Dr. McCann declined to hear the tape. Dr. McCann then asked if Officer Joseph was recording their conversation. When Officer Joseph told Dr. McCann that he was recording the conversation, Dr. McCann reacted negatively. Officer Joseph was later brought in for more testing, but was not interviewed again. Dr. McCann issued a report finding Officer Joseph unfit for duty.

Officer Joseph and his counsel met with Chief Connole to discuss the issues of his termination of his employment on March 14, 2000; however, Officer Joseph was terminated on March 31, 2000.

Dr. McCann did not conduct a complete and competent evaluation. First, Dr. McCann did not receive a full employment file for Officer Joseph in that he only reviewed Officer Joseph's first two quarterly performance evaluations, and not the three more recent evaluations. There is also a missing commendation letter. Second, in

his evaluation, Dr. McCann appears to give great weight to Union President David Greer's recitation of the vents of a union meeting of January 25, 2000. Officer Joseph had tape recorded the meeting, but Dr. McCann did not listen to the recording. Dr. McCann did not speak with other individuals attending the meeting. Third, Dr. McCann felt it necessary to talk to Union President Greer about one incident, but not to Officer Joseph's current supervisor Sgt. Scott White about Officer Joseph's overall performance following his reinstatement. Fourth, in the evaluation, the only portion of the evaluation which is in bold type sets forth the fact that Officer Joseph tape recorded the interview with Dr. McCann. Based upon the fact that Dr. McCann reacted negatively during the interview when he discovered it was being recorded and then emphasized it in his evaluation leads to the issue of possible bias on the part of Dr. McCann. Fifth, Dr. McCann states in the evaluation that an Axis II personality disorder is the basis for his finding that Officer Joseph is unfit for duty. Such a personality disorder is usually diagnosed early in life and is diagnosable in early adolescence. Prior evaluations, including the extensive testing prior to employment with the police department, did not detect such a disorder. Dr. McCann's analysis misses or does not address the Axis IV psychosocial stressors of being fired, betrayed by the union and charged by his peers with a felony. The analysis does not address those stressors and the short-term nature of any resulting behavior from those stressors. The evaluation is incomplete and inadequate.

If, in fact, Officer Joseph's fitness for duty is in question and sustained, it is inappropriate for SLPD to fire him rather than to employ some other remedy. SLPD is at least partially responsible by its actions for Officer Joseph's predicament. Officer Joseph was involved in a shooting, was criminally charged, was arrested and led to jail in front of his peers, was the target of negative media publicity, was called a liar by the department, had the criminal action dismissed immediately following the acquittal of another officer criminally charged in a separate incident, and now the department is washing its hands of Officer Joseph because it now says he is unfit for duty. SLPD has assisted other officers with problems without resorting to termination. Officer Joseph's actions have been reasonable under the circumstances; consequently termination of his employment is contrary to SLPD's policy.

Please list any witnesses you will have testify:

Name	Street	City/State/Zip	Telephone
Rob Joseph	1156 East Lost Eden Dr.,	Sandy, UT	571-3098
Yolanda Ruis-Martinez, SLPD, SLC, UT			799-3000
Dr. David L. McCann, 4190 Highland Drive, SLC, UT			272-9205
Dr. Leslie M. Cooper, 5635 Waterbury Way. #C-202, SLC			278-0200
H. Michele Myers, 670 East 3900 South, Ste 105, Murray, UT			261-4006
Sgt. Scott White, SLPD, SLC, UT			799-3000
Officer Michael Hill, SLPD, SLC, UT			799-3000
Officer Bruce Evans, SLPD, SLC, UT			799-3000
Officer Matt Larson, SLPD, SLC, UT			799-3000
Officer Washington, SLPD, SLC, UT			799-3000
Jeff Rowley, SLC Corp. Law Dept., SLC, UT			535-7788

Officer Joseph may also call an expert as yet unidentified to critique the evaluation and/or provide an evaluation of Officer Joseph's fitness for duty.

What records and other information do you request from the person who took the action which resulted in this appeal?

A copy of all correspondence between SLPD and Dr. McCann;
A copy of the report stating Officer Joseph was unfit for duty;
A copy of Dr. McCann's notes;
A copy of Officer Joseph's personnel file; and
Copies of records relating to Officer Joseph's being found unfit for duty.

What action do you want the Salt Lake City Civil Service Commission to take?

Reinstate Officer Joseph with full back pay and benefits or, in the alternative, reinstate Officer Joseph following efforts to bring Officer Joseph to a position of fitness for duty provided and paid for by Salt Lake City Police Department.

I hereby request a hearing before the Salt Lake City Civil Service Commission.

s/ Robert Joseph
Signature of Appellant

4/5/00

Date

Submit this document to the Secretary of the Salt Lake City Civil Service Commission, 451 South State Street, Room 115, Salt lake city, Utah 84111

SALT LAKE CITY CORPORATION
POLICE DEPARTMENT

A.M. "MAC" CONNOLE
CHIEF OF POLICE

ROSS C. "ROCKY" ANDERSON
MAYOR

March 31, 2000
Via Hand Delivery

Robert Joseph
1156 East Lost Eden Drive
Sandy, Utah. 84094

Re: **Employment Status**

Dear Rob:

Since we met in my office on March 14, 2000, I have pondered and evaluated your situation. I listened to the tape recording you provided to us. I considered your position, as stated by you and your attorney in our meeting. I sought further input from Dr. McCann. Nothing I have heard or considered since I received the Independent Medical Evaluation dated February 28, 2000 from Dr.McCann, however, has been sufficient for me to disregard Dr. McCann's medical conclusion that you are not psycholoically suitable to perform the duties of a police officer and that your personality traits "cause an increased risk of harm to [yourself], to other officers and to the citizens of Salt Lake City."

Therefore, it is with regret that I must terminate your employment as a Police Officer with Salt Lake City Corporation for incompetency pursuant to U.C.A. 10-3-1012. I use the term "incompetency" as it is defined in the Civil Service Commission Rules and Regulations: a lack of fitness to discharge the required duties and obligations of the position. Your termination will be effective on March 31, 2000. You have the right to appeal this decision by written notice to the Salt lake Civil Service Commission within (5) calender days from the receipt of this decision.

Very truly yours,

s/
Chief A. M. "Mac" Connole
Acting Chief of Police
Salt Lake City Police Department

cc: Bruce Reading, Esq.
Via Hand Delivery

Robert L. Joseph
Petitioner, Pro-se
1156 East Lost Eden Dr.
Sandy, Utah 84094
Telephone: (801) 571-3098

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

ROBERT L. JOSEPH, Petitioner, vs. **SALT LAKE CITY CIVIL SERVICE COMMISSION, SALT LAKE CITY CORPORATION, SALT LAKE CITY POLICE DEPARTMENT, AND THE CHIEF OF POLICE,** Respondents.	**MEMORANDUM IN SUPPORT OF THE PETITIONER'S MOTION TO SUPPLEMENT THE RECORD** Appeal No. 2001399-CA Priority No. (14)

COMES NOW the Petitioner, Robert L. Joseph Pro-se, submits the following Memorandum in Support of the Petitioner's Motion to Supplement the Record.

ARGUMENT

The Petitioner in his Request for Transcript identified several items that were not included in the Record provided to the Court by the Respondents. (Exhibit A)

1. The Petitioner sought to include as part of the record his pre-termination hearing transcript on March 14, 2000. This meeting was with Interim Chief Connole and Martha Stonebrook. The Petitioner intends to show the court that in this meeting the Petitioner

was not afforded due process rights. The Petitioner was only presented with Dr. McCann's report containing his findings that led to his determination that the Petitioner was allegedly unfit for duty at the beginning of the pre-termination hearing.

An officer has property interests in continued employment unless the person is afforded due process through established guidelines to terminate that employment. Worrall v. Ogden City Fire Dept., 616 P.2d 598, 601 (Utah 1980). Thus an officer has an interest in the procedural protections codified by a municipality to prevent unjust termination. See id., at 602. "In an analysis of a procedure, an important factor is the risk of an erroneous deprivation of a private interest through the procedures, and the probable value, if any, of additional or substitute safeguards." Worrall, 616 P.2d at 602.

The Petitioner was confronted with the evidence for the first time during the pre-termination hearing. The Petitioner was not able to prepare for the hearing and was not afforded the opportunity to refute Dr. McCann's report and conclusions due to unfair surprise. Had the Petitioner been presented with Dr. McCann's report prior to the pre-termination the Petitioner would have been able to get a second opinion to put on a defense.

The Petitioner was not able to put on a defense.

"To satisfy an essential requisite of procedural due process, a 'hearing' must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet." State v. Gibbs, 94 Idaho 908, 914, 500 P.2d 209, 215 (1972) In cases where the notice is ambiguous or misleading, courts have found a denial of due process. See also Watson v. Washington Preferred Life Insurance Co., 81 Wash. 2d 403, 502 P.2d 1016 (1972).

The Petitioner protested and Chief Connole stated that he would take these matters under advisement. (Exhibit A #1)

2. The Petitioner also requested a transcript of his termination meeting on March 31, 2001 in which Interim Chief Connole stated that he had considered the arguments made in opposition to Dr .McCann's report but did not feel that the Petitioner had presented any evidence that would cause him to change his mind.

The Petitioner was not afforded the opportunity to put on an adequate defense and the Respondents acted with prejudice and bias. (Exhibit A #2)

3. The Petitioner requested as part of the record a transcript of an evidentiary hearing before the Commission involving the Petitioners appeal on the ruling of out of policy in the use of deadly force. During the evidentiary hearing the Respondents argued that the Petitioners request for evidence to defend his appeal was overly broad and burdensome and that the other shootings were not relevant to the Petitioners case. The Petitioner argued that since he was the only officer to be found out of policy in the use of deadly force that these other cases would give weight to his argument of arbitrary discipline and would show that under similar circumstances other officers were ruled in policy. This transcript will clearly show the court once again, that the Commission acted with prejudice in favor of the city's interests at the expense of the Petitioners due process rights.

The transcript will further show the court that the Commission's dismissal of the Petitioner's termination hearing was an abuse of discretion and that there was a obvious disparity with the Commission's previous rulings. (Exhibit A #3)

4. In a letter dated July 17, 2001 Martha Stonebrook responded to the Petitioners request for documents dated July 13, 2001. On page 2 item #3, Ms. Stonebrook in refusing to supply the transcript stated: "That issue had nothing to do with your termination and was not before the Civil Service Commission in the appeal of your termination." Ms. Stonebrook has stipulated a number of times that she would not retry the deadly force case and that the only issues or evidence that the Commission would consider would be directly related to the Petitioners fitness for duty. Petitioner's Counsel at the time, Erik Strindberg clearly stated a number of times that the Petitioner would not be relying on any of tapes during his termination hearing and that the tapes are simply not relevant to the case. Ms. Stonebrook claims herself in the letter dated July 17, 2001 that they are not under obligation to produce documents or items not relevant to the matter before this court. None of the tapes were to be used in the termination hearing and were not related to the fitness for duty matter. However, Ms. Stonebrook simply used the Civil Service

Commission in a calculated attempt to in get the tapes that were to be used in two separate Civil Rights actions. The tapes have now been produced to the city in matter of Scott v. Salt Lake City and Joseph in accordance with the proper rules and procedures of discovery. The Respondents led the Commission into error by demanding the tapes not relevant to the matter before the Commission under threat of dismissal. (Exhibit B)

5. The Petitioner also requested a copy of the Commission's Order to Compel the Petitioner to produce the tapes. The Respondents have failed to produce a written certified order from the Commission. (Exhibit A#5)

6. The Respondents have also failed to provide the court as part of the record the following documents relevant to this matter:

a) Petitioner's First Set Interrogatories and Request for Production of Documents, dated April 2, 2001.

b) Subpoenas dated April 4, 2001 for documents previously requested but not provided from Dr. McCann and Dr. Cooper.

c) Various correspondence about evidence and requests for documents. The correspondence will confirm that the Respondents have themselves not complied with the Petitioners requests for documents. In a letter dated September 12, 2000 the Petitioner informed Ms. Stonebrook that Dr. Golding was unable to complete his review and evaluation of the Petitioner without the Petitioners pre-employment evaluation. This information has still not been made available to the Petitioner making it impossible to prepare for the termination hearing. The pre-employment evaluation is harmful to the Respondents position and refutes Dr. McCann's erroneous conclusions. (Exhibit C)

The Respondents have argued that the Petitioner has failed to produce tapes not ordered by the Commission. There was no certified order by the Commission compelling the Petitioner to produce anything but the Commission dismissed the Petitioners case for failing to comply with the non-existent order. Further more, the Commission enforced the Respondents Motion to Enforce Order and dismissed the Petitioners appeal and denied the Petitioner due process

rights by not affording the Petitioner the opportunity to oppose the Respondent's Motion to Enforce.

The Petitioner respectfully requests that this court order the Respondents to produce as part of the record on appeal, the documents identified above. Since the appeal before this court is an issue of due process rights not being afforded by the Commission, and the Respondents who have acted in conflict of interest as counsel for the Commission the court for the purposes of this appeal should treated the Commission and the Respondents as one and the same. The Petitioner's request to supplement the record should be allowed.

Dated this ____ day of July, 2001

Robert L. Joseph

s/_____
Petitioner, Pro-se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served Via Hand Delivery a true and correct copy of the foregoing on this ____ day of July, 2001, to:

Charles "Rick" Dinse
Salt Lake City Police Department
315 East 200 South
Eighth Floor Administration
Salt Lake City, Utah 84111

Martha Stonebrook
Assistant City Attorney
451 South State St, #505
Salt Lake City, Utah 84111

Salt Lake City Civil Service Commission
John E. Robertson
Richard Reike
Linda Kruse
451 South State St, #115
Salt Lake City, Utah 84111

s/
Robert L. Joseph, Petitioner Pro-se

Robert L. Joseph
Plaintiff, Pro-Se
1156 East Lost Eden Dr.
Sandy, Utah 84094
Telephone: (801) 571-3098

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

ROBERT L. JOSEPH, Petitioner, vs. **SALT LAKE CITY CIVIL SERVICE COMMISSION, AND SALT LAKE CITY CORPORATION, POLICE DEPARTMENT, AND THE CHIEF OF POLICE** Respondents.	**MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGEMENT** Appeal No. 20010399-CA Priority No. (14)

COMES NOW the Petitioner, Robert L. Joseph, Pro-se, pursuant to Rule 23 (a) of the Utah Rules of Appellate Procedure, hereby submits the following Memorandum in Support of Motion for Relief from Judgement. This Court must grant immediate relief and impose severe sanctions against the City who have, with deliberate indifference to Officer Joseph's civil rights, purported a fraud upon the Court. The City has blatantly misrepresented the facts to this Court in an effort to deceive the Court and deny Officer Joseph due process. The City has conveniently changed it's testimony to serve their own interests and meet the needs of the case at hand. It is one thing to actively put on a defense, it is another to knowingly deceive, obstruct justice, or present evidence that they know to be false, and yet purport it to be the truth before the court. This with the intent to benefit themselves or another, while deliberately depriving another of his rights.

Furthermore, the City in so doing, have actively conspired to obstruct justice and deprive Officer Joseph of his civil rights in violation of 42 U.S.C. § 1985 and 42 U.S.C.§ 1983.

This Court should review the materials and make a determination based on the merits.

ARGUMENT

I.

THE CITY IS DELIBERATELY DECEPTIVE AND MISLEADING.

In this matter "The City" presented a case before the Commission that was not supported by substantial evidence. In fact, the City failed to bare the burden of proof or produce any physical evidence to support their fictitious and deliberately deceptive claims, that Officer Joseph shot at Scott from a standing position as Scott was fleeing the scene, and that Scott posed no threat to Joseph's life. (R. 053 at 143-4).

Statements made by Salt Lake City Detective Mendez were in direct conflict with the physical evidence derived from the State Crime Lab and the subsequent investigation as presented to the Commission by Ballistic Expert Edward Barton and Accident Reconstructionist, David Lord. David Lord and Edward Barton, through an analysis of the physical evidence and the State Crime Lab reports concluded that Officer Joseph commenced shooting while traveling backwards on Scott's car, then continued to shoot as he was propelled or "dumped" from the car, and also shot while lying on the ground and still in danger of being run over. (R. 054 at 451-462; 054 at 545-546).

In making it's final determination and Order, the "Commission" ultimately relied on the unsubstantiated testimony of Salt Lake City Detective Jerry Mendez, and upon hearsay testimony Chief Mac Connole and Chief William Shelton, who by their own admission, did not participate in the investigation or look at the physical evidence. (R. 054 at 252-253; 346-347).

Ms. Stonebrook then argued the City's position before the Commission as if it were based on fact supported by the physical evidence, when in fact, Ms. Stonebrook knew it to be to the contrary.

(See Exhibit's I & II, Affidavit's of Judge Ernie Jones, prepared by "**THE CITY.**")

Salt Lake Civil Service Commission Hearing Testimony.

Detective Jason Snow.

Salt Lake City Police Detective Jason Snow testified before the Commission that he assisted the State Crime Lab in their evaluation of the shot trajectories and concluded that the shots were fired from "low to high," the highest bullet strike being 36 inches above the ground. (R. 053 at 89-92). Snow's testimony was in direct conflict with that of Detective Mendez who produced no physical evidence to support his claims, that Officer Joseph fired all his shots from a standing position, "on the move" as Scott was fleeing the scene and no longer posed a threat.

Detective Jerry Mendez

Salt Lake City Police Detective Jerry Mendez testified before the Commission that based on his experience, that Officer Joseph shot from a standing position and was on the move, taking steps as he shot at Scott's vehicle. Mendez presented no physical evidence to support his flawed theories, and in fact, testified that he didn't know how fast the car was traveling, and used terms such as " Maybe" and "Probably" to substantiate his claims. Mendez testified to the following before the Civil Service Commission, examination by Bruce Reading:

> **Q.** According to your analysis over your years of experience, how far did Officer Joseph move while he was shooting at this vehicle?
> **A.** Iwould say–you mean front/back, side-to-side?
> **Q.** Any direction?
> **A.** Side, I would say probably three to five feet. Forward, maybe four to five feet.
> **Q.** How fast does that car accelerate, do you know?
> **A.** No, I do not.
> **Q.** If we're talking movement of that distance how long do you think it would take Officer Joseph to move that distance

following that position?
A. I don't understand.
Q. My concern is this: You are saying he moved quite a bit?
A. Yes.
Q. Firing as he was moving?
A. Yes.
Q. The car is accelerating away, according to your theory?
A. Yes.
Q. The further the car goes, the lower he has to be to shoot, to make these strikes?
A. Okay.
Q. My question is: How was he moving according to you? Was he running or crawling, what was he doing?
A. He was moving by steps. You can cover three feet real quick by one step.
(R. 053 at 143-144).

Chief William Shelton

Salt Lake City Assistant Police Chief William Shelton testified before the Commission that he had no involvement in Officer Joseph's investigation and simply relied on an alleged eye witness who did not participate in the hearings, and what was reported to him by City investigators. Shelton even acknowledged that eye witnesses can sometimes be mistaken. Once again, no physical evidence was presented to support any of the City's claims. Shelton testified before the Commission to the following under examination by Bruce Reading:

Q. All right. If for some reason Officer Mendez and Officer Mendez's testimony is this, that the window was shot out as the vehicle was driving away from Rob Joseph. That was one of his issues. If that was an error, would that have influenced your decision in anyway that in fact the window was broken while the vehicle was coming in reverse towards Rob Joseph?
A. There was 11 rounds fired in total which is a lot of rounds, first off. In all honesty, I was more concerned with the fact that they saw Rob Joseph standing in the street firing and saw nobody else around.

Q. Have witnesses occasionally been mistaken?
A. Oh, absolutely.
Q. And if the evidence of the bullet strikes simply would not support that analysis or testimony by a witness, would that be important to you in your decision whether Mr. Joseph was out of policy?
A. It would be ridiculous for me to say I wouldn't put any stock in listening to that kind of information. Of course, that would be silly not to. But again like I say, you need to look at everything, not just a single element or single piece of evidence.
(R. 054 at 275-276).

Chief Mac Connole

Salt Lake City Acting Police Chief Mac Connole testified before the Commission that he did not look at the physical evidence and simply relied on statements and reports from investigators in making his determination. Connole testified before the Commission under examination by Bruce Reading:

Q. I think you mentioned, Chief, on your direct testimony, that one of your concerns was that Officer Joseph was shooting at this vehicle as it was driving on 7th East away from the officer?
A. Yes.
Q. Did you take a look at the physical evidence of the bullet strikes to determine whether that was true?
A. No, I relied on the information I obtained from the Internal Affairs investigator and the homicide investigators.
Q. In fact, that's why you have those investigators out there, you have to rely on them?
A. Yes.
Q. If it has been determined or if it is determined that that investigation was flawed, that in fact the shots could not have been fired at the vehicle as it was traveling away from Officer Joseph, down 7th East, would that have changed your decision in anyway?
(R.054 at 346-347).

Chief Connole, after failing to answer the last question, also

testified before the Commission that the physical evidence gathered by the County and City supported his conclusion. Chief Connole's testimony is particularly disturbing in that the City's did not present any physical evidence to the Commission from the County and City investigations. Chief Connole Civil Service Commission examination by Bruce Reading:

> **Q.** If you find that that evidence is not accurate, in other words, that that is not the facts, would that have changed your attitude at all about the shooting being out of policy?
> **A.** Can we discuss it?
> **Q.** Sure. Absolutely.
> **A.** I think that when I came to this conclusion that you need to look at the county attorney has an investigator there, we have a homicide investigator there, and completely independent of those two we have an Internal Affairs investigator there. All of them said that there was inconsistencies with what Officer Joseph said occurred and what they found as evidence to their investigation.
> **Q.** Would you put higher priority on the physical evidence or the testimony of individuals?
> **A.** Well, I'm saying that they used physical evidence in their investigation.
> I know you are going to bring expert witnesses in. And that's fine. If you can prove it beyond a reasonable doubt, that's good too. But the information that I had and the evidence that I had is the reason that I decided the way I did.
> (R. 054 at 348-349).

Ms. Martha Stonebrook

Ms. Stonebrook and the City's witnesses maliciously fabricated a case void of the truth or material fact. The City's case lacked any evidence. That is, it was based totally on a fictional and deliberately bifurcated and misleading accounts of the facts, that only went to serve their own interests at the expense of Officer Joseph's due process rights.

Steve Allred, Ms. Stonebrook, Chief Connole, Chief Shelton and Detective Mendez produced no physical evidence to support their

false claims that Officer Joseph fired all his shots from a standing position, "on the move" as Scott was fleeing the scene and no longer posed a threat. Ms. Stonebrook attempted to convince the Commission that the investigations conducted by the County and the City concluded one thing, when she knew full well that the facts did not support their position. In so doing, the City has deliberately and maliciously purported a fraud of the most egregious kind. The City has attempted to convey facts to this Court that they know not to be the truth. The City even attempted to put before the Commission and this Court fabricated facts about the District Attorney's conclusions and basis for dismissal of the criminal charges against Officer Joseph. Officer Joseph previously attempted to put before the Court in his Addenda accompanying his Brief, documents and evidence known to the City to refute their false claims and impeach their testimony. The City objected to those Addenda claiming that they were not part of the official record:

> It is well recognized that an appellate court's review is "limited to the evidence contained in the record on appeal." *State v. Pliego,* 1999 UT 8, ¶ 7, 974 P.2d 279, (holding that an appellant's addendum may not consist of evidence that is outside the record on appeal). (See Brief of Respondents).

The City's actions were specifically intended to deprive Officer Joseph of his due process and other State and Federal Constitutional Rights. Mr. Allred and Ms. Stonebrook, as it will be evident to this Court after a review of Exhibits I & II have indeed purported a fraud upon this Court. The following Affidavits were prepared by the City to be used in other matters involving Officer Joseph and were intended to deprive him of reimbursement of legal costs in the matter of the *State of Utah v. Robert L. Joseph.*

The Petitioner, Officer Joseph, respectfully submits to this Court that Ms. Stonebrook and the City have blatantly misrepresented the facts before the Commission and this Court in violation of Title 42 U.S.C. §1983 and are guilty of conspiracy to obstruct justice in violation of Title 42 U.S.C. §1985(2). This Court should not let the City get away with its deception by presenting FICTION. The Petitioner, Officer Joseph respectfully pleas to this Court for immediate relief from judgement and requests that the Court consider the evidence attached in support of his Motion for Relief from

Judgement:

EXHIBIT I
FIRST AFFIDAVIT OF JUDGE ERNIE JONES

The City prepared an Affidavit for the Honorable Judge Ernie Jones in the matter of *Loni F. Deland and Robert Leon Joseph v. Salt Lake City Corporation,* in the Third District Court Salt Lake County, State of Utah. The City prepared and submitted to the court the sworn statements of Judge Jones about the facts that lead to the dismissal of Officer Joseph's criminal case. These facts are the truth, and are in direct conflict with the City's position before the Commission and this Court. The City, in submitting these Affidavit's before the Third District Court swear them to be the truth. What this Court should find particularly disturbing about this first Affidavit is that it is dated April 6, 2001. The City's Brief to this court was filed on November 6, 2001. At the time the City submitted their Brief, Ms. Stonebrook knew or reasonably should have known that the evidence and testimony presented by the City to the Commission and subsequently to this Court was fragrantly false. The following pertinent part, is taken from the sworn testimony prepared and submitted by the City to the Third District Court:

> **10. The State crime lab performed a laser reconstruction of the bullet strikes from officer Joseph's weapon on the vehicle. The laser reconstruction showed the shots were fired while Officer Joseph was sitting or lying on the ground. The trajectory was "low-to-high" in angle.**
>
> **11. The results of this reconstruction appeared to contradict that State's earlier theory which was that Officer Joseph was standing up when he fired at the victim's vehicle.**

EXHIBIT II
SECOND AFFIDAVIT OF JUDGE ERNIE JONES

The City prepared a second Affidavit for the Honorable Judge Ernie Jones in the matter of *Loni F. Deland and Robert Leon Joseph v. Salt Lake City Corporation,* in the Third District Court Salt Lake County, State of Utah on April 17, 2002. Once again, the City

prepared and submitted to the court a sworn Affidavit by Judge Jones, that the City knows to accurately reflect the facts or evidence of Officer Joseph's case. In light of this Affidavit it should be obvious to this Court that the City is guilty of misconduct and purporting a fraud upon this Court. This Affidavit reads, in pertinent part:

> **9. I have also reviewed the report prepared by the State Crime Lab showing that the bullet trajectories were slightly upward direct [sic], that is, from "low-to-high" as I had previously testified. A copy of that report is attached hereto.**
>
> **10. I have also reviewed copies of photographs of the laser tests and the dowel and rod test that I also reviewed as part of my decision to dismiss the charges against Mr. DeLand's client. These photographs led me to conclude that the shots fired were from "low-to-high" and that the state's earlier analysis that Officer Joseph was standing when he fired the shots was incorrect.**
>
> **11. From these tests and photographs, I concluded that it was more likely than not that Officer Joseph was either falling down or was on the ground and that such facts were not inconsistent with his statement. Accordingly, I determined, after consultation with a review committee of prosecutors, to dismiss the charges against Mr. DeLand's client.**

EXHIBIT III
SUPPORTING DOCUMENTS AVAILABLE TO THE CITY.

A. District Attorney Memorandum Dated November 18, 1999.

The City had this memorandum prior to the filing of their Brief and yet they still moved forward with misrepresenting the facts to this Court and failed to present the facts objectively. The memorandum in its entirety is clearly in conflict with the City's analysis of the incident and their claims about the evidence derived from the District Attorney's investigation and conclusions.

The following pertinent parts speak specifically to the issue of

whether or not Officer Joseph was standing or "on the move" when the shots were fired:

> **Tests completed by the State Crime Lab show the angle of the shots fired into Mr. Scotts vehicle were from "low to high." This analysis suggests that shots were fired while the officer was on the ground and in danger of being run over by the vehicle. While the injuries to Wesley Scott were serious it appears that Mr. Scott created the situation which caused these injuries. Officer Joseph was justified in shooting Wesley Scott because of the threat of being run over or injured by Mr. Scott's vehicle. Also Officer Joseph was justified in using deadly force to effect the arrest and preventing the escape of Mr. Scott after the assault was committed.**

B. Motion to Dismiss, State's Response and Order of Dismissal.

Assistant District Attorney Prosecutor Ernie Jones was assigned Officer Joseph's criminal case. Mr. Jones was presented with all the erroneous and fabricated facts and evidence generated by Salt Lake City Police Detective Jerry Mendez. Mr. Jones, after being confronted by the facts adduced at Officer Joseph's preliminary hearing, as well as evidence based upon expert reconstruction and upon further review of the State's peace officer use of deadly force statute, concluded that the evidence did not support the original theories as presented by Detective Mendez and other investigators. Upon a motion by attorney Mr. Loni Deland, the case against Officer Joseph was dismissed "with prejudice."

II.
THIS COURT SHOULD, IN THE ALTERNATIVE, REMAND THE CASE BACK TO THE CIVIL SERVICE COMMISSION FOR AN EVIDENTIARY HEARING IN LIGHT OF THE CITY'S MISCONDUCT.

The Utah Court of Appeals has reasoned in *State of Utah v. Sixteen Thousand Dollars*, 914 P.2d 1176 (1996), "[A] party asserting error must first present the issue to the trial court through post-judgement motion prior to seeking appellate review." Then,

the Court went on to clarify, "Again, the proper course for an aggrieved party to follow would be to make a Rule 60(b) motion for relief from judgement, see Utah R. Civ. P. 60(b)(7) (allowing a motion to be made on the basis of "any other reason justifying relief from the operation of the judgement"), or a motion for a new trial, or amend the judgement, pursuant to Rule 59. See Utah R. Civ. P. 59(a)(5),(a)(6), (a)(7) (indicating that excessive damages, such a motion) . . . ."*Id.* Consistent with that, the court explained,

> "A trial court should be given an opportunity to correct errors of law, as well as to excuse a defaulting party when reasonable, so as to resolve any arising controversy before appeal." *Id.* (citations omitted).

The concept of allowing the trial court, or in this particular case, [The Civil Service Commission] an opportunity to correct it's error is long standing and should be consistent with the Petitioner's Motion in the Alternative. The Petitioner did originally file a Motion for Reconsideration with the Civil Service Commission on August 1, 2000. The Commission denied the motion on December 6, 2000 supporting the City's argument that the Petitioner's filing of a Petition for Review with this Court divests the Commission of jurisdiction.

In light of the City's deliberately deceptive conduct, the Court in the Alternative should grant the Petitioner leave or remand the case back to the Commission for a new hearing in the interest of justice and allow the Commission to correct it's errors and perfect the record so that they may issue an objective finding from the truth.

CONCLUSION

This Court should be outraged and offended by the conduct and pattern of abuse by the City in this matter. The City was deliberately deceptive and misleading in presenting facts before the Commission and subsequently to this Court that they knew to be false. This Court should conclude after a review of the evidence that the City did willfully purport a fraud upon the Court, and did so, with the malicious intent to obstruct justice and deprive the Petitioner of his due process rights.

The Petitioner respectfully requests: 1) that this Court grant

his Motion for Relief from Judgement; 2) set aside the Commission's Findings of Fact, Conclusions, and Order; 3) order the City to reimburse the twenty day suspension with interest; 4) and award legal costs and reasonable attorney's fees in conjunction with the matter before the Civil Service and this Court.

In the Alternative, the Petitioner requests, in the interest of justice, that the case be remanded back to the Commission for an evidentiary hearing. The Petitioner further pleas in the Alternative, that in light of the City's misconduct and deception, that they also be ordered to pay legal costs and reasonable attorney's fees accrued to this point.

Dated ___ Day of June, 2002.

s/_____
Robert L. Joseph, Petitioner Pro-se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served VIA HAND DELIVERY a true and correct copy of the foregoing on this ____ day of June 2002, to:

Martha Stonebrook Esq.
Assistant City Attorney
451 South State St, #505
Salt Lake City, Utah 84111

D. Bruce Oliver, P.C.
180 South 300 West, Suite 210
Salt Lake City, Utah 84101

Salt Lake Civil Service Commission
Commissioner John E. Robertson
Commissioner Richard Reike
Commissioner Linda Kruse
451 South State St, #115
Salt Lake City, Utah 84111

Loni Deland
Attorney at Law
43 East 400 South
Salt Lake City, Utah 84111

J. Bruce Reading
Scalley and Reading
261 East 300 South
Second Floor
Salt Lake City, Utah 84111

Chief Charles "Rick" Dinse
Salt Lake City Police Departmen
315 East 200 South
Salt Lake City, Utah 84111

s/
Robert L. Joseph Petitioner Pro-se

LAW OFFICES OF
SCALLEY & READING
A PROFESSIONAL CORPORATION

261 EAST 300 SOUTH
SECOND FLOOR
SALT LAKE CITY, UTAH 84111

February 23, 2000

VIA HAND DELIVERY

Commissioner John Robertson
Salt Lake City Civil Service Comm'n
451 South State Street, Room 115
Salt Lake City, Utah 84111

Re: *Appeal of Officer Robert Joseph*

Dear Commissioner Robertson:

Enclosed please find a Subpoena for Documents in the above-referenced matter. In Officer Joseph's appeal, he requested certain police files in order to defend his case. Salt Lake City Corporation, through its Law Department, is refusing to release those files, based upon a GRAMA objection. Attached hereto as Exhibit "A" is a letter from opposing counsel, Martha Stonebrook, denying our request for files.

It is imperative that we have these files in order to move forward with this case and are requesting your assistance through your subpoena power to gain access to them. Under *Vetterli v. Civil Serv. Comm'n*, 106 Utah 83, 145 P.2d 792 (1944), and its progeny we are entitled to this information to prove our case.

Should the City not release this information in a timely fashion, we would be forced to request a continuance or a Motion to Dismiss based upon the City in essence tying our hands to prevent us from making our case.

A self-addressed stamped envelope is enclosed for the return

of the subpoena.

Thank you for your assistance in this matter.

Sincerely,

SCALLEY & READING, P.C.

s/
J. Bruce Reading
Counsel for Officer Rob Joseph

cc: Martha Stonebrook
Robert Joseph

Officer Rob Joseph
C/O Scalley & Reading
261 East 300 South
Salt lake City, Utah 84111

March 21, 2000

Via hand delivery

Martha Stonebrook
Assistant City Attorney
451 S State St
Room 505
Salt Lake City, Utah 84111

Dear Ms. Stonebrook:

Please find enclosed a copy of the tape you and Chief Connole requested of the January 25th, 2000 union meeting. I hope that the tape will be helpful to your investigation.

Sincerely,

s/
Officer Rob Joseph

Received by:_____

Date:_____

ROBERT L. JOSEPH
1156 EAST LOST EDEN DR
SANDY, UTAH 84094
1(801) 571-3098

MAY 23, 2000

Martha Stonebrook
Assistant City Attorney
451 South State Street
Room 505
Salt Lake City, Utah 84094

RE: *Robert Joseph vs Salt Lake City Corporation.*

Dear Ms. Stonebrook,

As you probably are now aware J. Bruce Reading was terminated as my counsel last week and no longer represents my interests before the civil service commission or in the matter before the United States District Court. You will be notified immediately when new counsel has been retained.

1. I have contacted the Civil Service Commission and requested that the hearing scheduled for June be canceled and rescheduled at a later date.

2. I have spoken to Roger Bullock and will provide what ever evidence he needs to prepare for the upcoming Westley Scott preliminary hearings.

3. I have already provided him with video and audio tapes.

4. I will make available the use of all exhibits. These exhibits will remain in my custody until such time that they are needed for discovery.

5. Please direct all correspondence to me directly until further notice.

Sincerely,
s/
Rob Joseph

ROBERT L. JOSEPH
1156 EAST LOST EDEN DR 1(801) 571-3098
SANDY, UTAH 84094

June 29th, 2000

Chairman John Robertson
Commissioner Richard Reike
Commissioner Linda Kruse
451 South State Street, Room 115
Salt Lake City, Utah 84111

Re: *Rob Joseph termination hearing*

Dear Commissioners Robertson, Reike, and Kruse,

In the matter of Rob Joseph vs Salt Lake City on the issue of the termination appeal before the Salt Lake City Civil Service Commission.

I am greatly concerned as to whether the commission should have heard the appeal on the issue of deadly force, in the matter of Joseph vs Salt Lake City because of the obvious conflicts of interest. I believe that commission erred in agreeing to hear the appeal on deadly force because the Joseph civil rights suit had been filed. I believe that the commission should have declined to hear the matter and referred it to an independent body or the Utah Court of Appeals to avoid conflict of interest issues.

The testimony from the hearing on deadly force will be used as additional evidence in my civil rights case against Salt Lake City Corporation as will the Commissions ruling. I feel that the commission should decline to hear my termination hearing due to the obvious conflict of interest issues. I would like the commission to refer the appeal to the Utah Court of Appeals or recommend other options that would not place the commission in further conflict of interest.

Sincerely,
s/
Robert L. Joseph

ROBERT L. JOSEPH
1156 EAST LOST EDEN DR
SANDY, UTAH 84094
1(801) 571-3098

July 25, 2000

Martha Stonebrook
Assistant City Attorney
451 South State Street, Room 505
Salt Lake City, Utah 84111

RE: *Robert Joseph vs Salt Lake City Corporation---Termination Hearing*

Dear Ms. Stonebrook,

In preparation for the termination hearing before the civil service commission I will need some of the following materials before I can proceed any further.

1. Dr. McCann's notes and records.

2. Dr. Cooper's data, notes and records.

3. Pre-employment psychological evaluation, notes, data and reports.

4. Complete Internal Affairs files from all previous complaints.

As soon as you can make these materials available I will be able to prepare to move forward with my hearing.

Sincerely,
s/
Rob Joseph

cc: Civil Service Commission
Chief Connole

ROBERT L. JOSEPH
1156 EAST LOST EDEN DR
SANDY, UTAH 84094
(801) 571-3098

Civil Service Commission
451 South State Street
Room 505
Salt Lake City, Utah 84111

VIA HAND DELIVERY
August 7, 2000

Re: *Robert Joseph termination hearing.*

Dear Ms. Mendez-Castillo:

I am in receipt of your letter dated July 28th. I will not be attending the Civil Service meeting scheduled for August 17th. My former attorney Bruce Reading made a request several months ago for information from Ms. Stonebrook to help prepare for my termination hearing. As of today I have not received anything from Ms. Stonebrook. I cannot proceed until the requested information is supplied.

Please find enclosed a copy of my recent request to Ms. Stonebrook for information to help prepare for my termination hearing. My expert psychiatrist will need at least a month to review the information that I have requested from Ms. Stonebrook in order to prepare for the hearing. As soon as I get the requested information from Ms. Stonebrook in I can met with commission and set a date. If Ms. Stonebrook can provide me with the requested information, this month I can anticipate that we can proceed by the end of September or early October. If it is the commission's position to force a hearing, despite the fact that the city has not provided the required information to make a defense, then I guess we move forward. I have no legal experience to know whether or not you can deny my right to a hearing.

I have been meeting with the Attorney General's office, Anti-discrimination and Labor Division and there is a possibility that they might represent me in the hearing. Failing that, and in lieu of your most recent demand to move forward I will be representing myself Pro-Se due to my current financial circumstances.

I have not received my information from the commission as to what my rights are for an appeal of the commission's deadly force ruling and what time lines might be for filing such appeals. I'm sure that the commission has no intention of violating my rights in the matter. I still need to get my exhibits as soon as possible for other pending investigations and legal matters related to my shooting. If the Civil Service Commission has finished with my exhibits, I would like to pick them up immediately. Thank you.

Sincerely,
s/
Robert Joseph

SALT LAKE CITY CORPORATION
LAW DEPARTMENT

August 16, 2000

Robert Joseph
1156 East Lost Eden Drive
Sandy, Utah 84094

Re: Joseph v. Salt Lake City (Civil Service matter only)

Dear Mr. Joseph:

Enclosed with this letter are copies of the documents you requested by letter dated July 25, 2000, with the exception of Dr. Cooper's "data, notes, and records." I have not yet obtained those but will forward that documentation when I get it.

During our telephone conversation of August 15, 2000, you indicated that you would provide me with the documentation I request both by letter to you and in our response to your appeal when you received a report from a Dr. Golding. Please be advised that I cannot go forward with the termination hearing until I receive the documentation I have requested. If you will be relying on a report by Dr. Golding, or on an other medical or psychological evaluations, testing or opinions, I am also entitled to that information as well.

I also asked that you provide me with the tape recording you made of your examination with Dr. McCann. You indicated to me that you would need to speak to an attorney before you produced that tape to me because of your privacy interests. Please understand that if you are going to rely in any way on that tape during the Civil Service hearing regarding your termination, I am entitled to have a copy of that tape. You taped Dr. McCann without his knowledge. He also has an interest in the contents of that tape. I will continue to request that you give me a copy of that tape.

I also asked you if you had retained an attorney to represent you in the Civil Service matter regarding your termination. You told me that you had not retained an attorney as of our August 15, 2000 telephone

conversation. Please inform me at once if your pro se status changes. As I told you during our conversation, I will only discuss with you matters that relate directly to your appeal of your termination that is still pending before the Civil Service Commission. On any matters that relate to the Westley Scott lawsuit, I will only deal with your attorney, Roger Bullock.

Very truly yours,
s/
Martha S. Stonebrook
Assistant City Attorney

enclosures:

documents labeled:

Psych 001-059 (pre-employment psychological info. And Dr. McCann's notes)

Internal Affairs files concerning Robert Joseph, excluding the IA file on the matter involving Westley Scott that has been previously produced to both Mr. Bruce reading, esq. And Mr. Roger Bullock, Esq.:

IA99-0221 001-066
IA99-151 001-094
IA99-142 001-012
IA98-691 001-092
IA98-621 001-132
IA98-03P 001-042
IA98-01P 001-018

ROBERT L. JOSEPH
1156 EAST LOST EDEN DR
SANDY, UTAH 84094
(801) 571-3098

Martha Stonebrook
Assistant City Attorney
451 South State Street
Room 505
Salt Lake City, Utah 84094

VIA HAND DELIVERY
September 12, 2000

RE: *Robert Joseph vs Termination Hearing*

Dear Ms. Stonebrook,

Dr. Golding is unable to move forward with his review until he receives my complete pre-employment psychological evaluation. We are also waiting on Dr. Cooper's notes and records. Could you please forward these on to me as soon as they are available?

There are a couple of things that I am not sure of in relation to my situation that you might be able to enlighten me on:

1. Am I entitled to receive a second opinion of Dr. McCann's evaluation at the cities expense?

2. Under the circumstances surrounding my termination, should the city provide me with counseling, or at least cover the costs of counseling?

3. As a result of being terminated for psychological problems, am I entitled to workers compensation? If so could you send me the appropriate information.

Sincerely,
s/
Robert L. Joseph

cc: Civil Service Commission

**COHNE
RAPPAPORT
& SEGAL**

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
525 EAST FIRST SOUTH, 5TH FLOOR
SALT LAKE CITY, UTAH 84102
(801) 532-2666
(801) 355-1813 FAX
(8010 364-3002 FAX

March 16, 2001

Martha S. Stonebrook
Assistant City Attorney
451 South State Street, Room 505
Salt Lake City, Utah 84111

Re: Robert Joseph

Dear Martha:

I need to have you produce, or make available for my review, the following documents:

1. All investigative material, including but not limited to reports, interviews, tests, and the like done by the Salt Lake Police Department, or any agency on behalf of the police department, pertaining to the original allegations against Robert Joseph (i.e.-the shooting of the motorist), and any subsequent allegations;

2. Any notes reports of reviews or decisions issued by any internal affairs and/or shooting review boards pertaining to Robert Joseph;

3. Any reports, documents, notes, etc. in the possession of Sergeant Scott White pertaining to Robert Joseph in the incident which lead to his initial suspension(i.e. the shooting of the motorist);

4. Any notes, records, documents, etc. in the possession of sergeant Bailey pertaining to Robert Joseph and/or the incident which lead to his initial suspension (i.e. the shooting of the motorist).

5. Any notes, records, documents, etc. in the possession of Lieutenant Terry Morgan pertaining to Robert Joseph and/or the incident which lead to his original suspension (i.e. shooting of the motorist);

6. Any notes, records, documents, etc. in the possession of David Greer pertaining to Robert Joseph and/or the incident which lead to his original suspension (i.e. shooting of the motorist);

7. Please produce any and all psychological reports which the City has prepared, or received from any psychologists or health care physician which were retained by the City pertaining to Robert Joseph;

8. Please provide us with copies of any fitness for duty evaluations that the City has performed or authorized someone to perform on behalf of Robert Joseph.

9. Please produce copies of all reports, investigative reports, correspondence, etc. pertaining to the decision to terminate Robert Joseph.

Sincerely,

COHNE, RAPPAPORT & SEGAL, P.C.
s/
Erik Strindberg

ES:cd
Encls.
cc: Robert Joseph

COHNE RAPPAPORT & SEGAL

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
525 EAST FIRST SOUTH, 5TH FLOOR
SALT LAKE CITY, UTAH 84102
(801) 532-2666
(801) 355-1813 FAX
(8010 364-3002 FAX

March 30, 2001

Martha S. Stonebrook
Assistant City Attorney
451 South State Street, Room 505
Salt Lake City, Utah 84111

FACSIMILE TRANSMISSION
535-7640

Re: Robert Joseph

Dear Ms. Stonebrook:

I am in receipt of your letter dated March 30, 2001 in this matter. At no time has the Commission ruled what tapes should be produced by Mr. Joseph. That issue has never been addressed by the Commission. The only two tapes that you have ever specifically requested from us are the tape of Dr. McCann as well as the tape of a conversation that Mr. Joseph apparently had with the acting Captain. At all other times you indicated that you wanted other tapes only if we intended on relying upon them at the Commission hearing. As I have told you repeatedly, we are not now intending on relying on any other tapes. Therefore, they are simply not relevant in this matter. I think it is also ironic that you are demanding all the tapes when you yourself indicated that we are not going to relitigate the shooting incident. This matter is limited solely to Mr. Joseph's termination for failing to be fit for duty. I do not believe that I am under any obligation to produce to you information and materials which is not relevant to that issue.

Further, it is my understanding that in the Wesley Scott case, where you are basically serving as Mr. Joseph's co-counsel (through your representation of the City), arrangements have been made wherein Mr. Joseph's other counsel will be reviewing all of the tapes

and will be providing complete copies to you in short order. By demanding that I have them to you on this date is putting form over function and may endanger Mr. Joseph's defense in the case involving Wesley Scott. Also, it puts an extreme financial burden on Mr. Joseph, making him pay to have two attorneys do the same review.

Further, I am not at liberty to demand that Mr. Joseph turn over all of the tapes to me in contradiction to the instructions that he has received from his other attorney, Bruce Oliver. I can't imagine that you would even contend that I have the right to contradict Mr. Oliver's instructions to his client.

Accordingly, to reiterate my previous letters to you, we have a large number of documents which you are free to pick up at any time. Simply call my secretary, Chantel Drown, to make arrangements to do so. In addition, Mr. Joseph is delivering certain tapes to me this afternoon, although I'm not yet sure what is being delivered to me. As I indicated to you, for personal reasons I need to be out of the office starting at 2:00 p.m. and will not have a chance to review those tapes. I will do so promptly Monday morning and will have them delivered to your office Monday at approximately mid-day.

Sincerely,

COHNE, RAPPAPORT & SEGAL, P.C.
s/
Erik Strindberg

ES:cd

cc: Robert Joseph

**COHNE
RAPPAPORT
& SEGAL**

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
525 EAST FIRST SOUTH, 5TH FLOOR
SALT LAKE CITY, UTAH 84102
(801) 532-2666
(801) 355-1813 FAX
(8010 364-3002 FAX

April 2, 2001

Martha S. Stonebrook
Assistant City Attorney
451 South State Street, Room 505
Salt Lake City, Utah 84111

Re: Robert Joseph

Dear Ms. Stonebrook:

When we last talked you indicated that you were still checking with Sergeant Bailey, Lieutenant Terry Morgan and David Greer to see what notes, records and documents they have in their possession pertaining to Rob Joseph, or the incident which lead to his suspension. Could you please let me know if you have reached those people and, if they do have any documentation pertaining to Mr. Joseph, could you please produce them to us immediately.

Further, there is additional information and documents that wee need to have you produce to us if we are going to adequately prepare for Mr. Joseph's hearing. I have prepared a set of Interrogatories and Request for Production of Documents detailing those requests. Those Interrogatories and request for Production of Documents are enclosed with the letter.

Sincerely,

COHNE, RAPPAPORT & SEGAL, P.C.
s/
Erik Strindberg

Robert L. Joseph
1156 East Lost Eden Dr
Sandy, Utah 84094
(801) 571-3098

July 13, 2001

Martha Stonebrook
Salt Lake City Attorney's Office
451 South State Street, Ste 505
Salt Lake City, Utah 84111

Re: Joseph v. Salt lake Civil Service Commission-Utah Court of appeals 20010399 CA

Dear Ms. Stonebrook,

I requested a number of items be provided in the Request of a Transcript. Some of the items were not provided. I respectfully request that the following be made available to me so that I can file a motion to supplement the record.

1. The complete reporter's transcript and copy of the tape of Officer Joseph's pre-termination hearing before Interim Chief Connole on or about March 14, 2000. (Previously requested).

2. The complete reporter's transcript and copy of the tape of Officer Joseph's termination hearing before Interim Chief Connole on or about March 31, 2000. (Previously requested).

3. The complete reporter's transcript and a copy of the tape of the evidentiary hearing held before the Salt Lake Civil Service Commission on or about February 29, 2000. (Previously requested).

4. A certified copy of the Salt lake Civil Service Commission's Order Compelling Officer Joseph to produce all tapes of conversations with any city employee. (Previously requested).

5. A certified copy of Salt Lake City's Motion to Enforce the Commission's Order to Compel Officer Joseph to produce the tapes.

(Previously requested).

6. A certified copy of Salt Lake City's Motion in Opposition to Officer Joseph's Motion to Strike the Commission's Order of Dismissal and Allow the Hearing to Go Forward. (Previously requested).

7. A certified copy of the Salt Lake Civil Service Commission's Order Denying Officer Joseph's Motion to Strike Order of dismissal and Allow Hearing to Go Forward, dated April 19, 2001. (Previously requested).

8. A complete copy of the official Record on appeal as produced to the Court by the Salt Lake Civil Service Commission. Index of Record. (Bates Stamped 001-216).

I would appreciate your cooperation in this matter.

Sincerely,
s/
Robert Joseph

HEADQUARTERS for
PSYCHOLOGICAL EVALUATION
P.O. Box 5546, Snowmass Village, Co 81615 Phone (970)923-2233
Fax (970)923-2244

CAROL NUDELMAN, PSY.D.,P.A.
LICENSED PSYCHOLOGIST

PSYCHOLOGICAL SCREENING SUMMARY
Security Officer

NAME:*Robert Joseph

REPORT DATE:
07/17/2000

SSN:

In accordance with security screening procedures and recommendations of WACKENHUT/Salt Lake this individual was administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) on 07/17/2000. The resultant clinical profile suggests an individual whose current psychological functioning is without significant psychopathology. Thus, the overall personality profile failed tp yield any serious indications of emotional instability such that there would be reasonable doubt that duties could be discharged in a responsible manner.

It is recommended that this individual be currently viewed as psychologically suitable for a position of Security Officer. Final personnel decisions should be based upon an overall evaluation of relevant information about the applicant, including test scores (clinical information where available), personal knowledge, and other personnel information.

*Identification was verified prior to administration of the MMPI-2.

Favorable Recommendation

s/
Carol Nudelman, Psy.D.
Licensed Psychologist

LAW ENFORCEMENT
PSYCHOLOGICAL SERVICES, Inc.

APPLICANT NAME: Robert L. Joseph
SOCIAL SECURITY NUMBER:
POSITION: Police Officer
AGENCY: Salt Lake City Police Department
DATE OF ASSESSMENT: March 7, 1997

RE: Employment Suitability Assessment

The above named applicant was administered a battery of psychological tests and was individually interviewed by the psychologist. This job suitability assessment should be considered as only one aspect in the selection process; the final hiring decision should be made by the agency after careful consideration of data from all aspects of the screening procedure.

This recommendation is only intended for the position the applicant was assessed for, and should not be considered valid for the use in hiring or assignment decisions for more than one year after the date of the interview.

The integration of psychological test and interview information indicates the applicant is essentially psychologically stable and suited for the position in question.

s/
THOMAS J. REIDY, Ph.D.,A.B.P.P.
Diplomate in Forensic Psychology
American Board of Professional Psychology

VRI
VOCATIONAL RESOURCES, INC

February 14, 2000

Rob Joseph
1156 E. Lost Eden Dr.
Sandy, UT 84094

Dear Rob,

Pursuant to your request for a letter of my clinical observations of our initial session on 3-31-99, I am sending you this letter.

You were referred to VRI by a supervisor who you understood to say that after a critical incident, police policy mandated one EAP visit. I remember you retelling me the incident of 3-26-99 in which you were in the process of making a traffic stop when the violator accelerated the vehicle almost causing harm to you and you discharged your firearm at him.

You were not emotionally distressed about the situation and felt that you had made the correct call in discharging your firearm. I asked if you were anxious about the situation and you only felt an increased anxiety because of internal policies questioning your actions. You claimed that following the incident you didn't sleep for a couple of days but felt that was not unusual in similar circumstances.

Further, you related that you loved your job and generally were happy with your life.

This situation did not appear to cause you trauma, nor did you feel as if you acted irrationally. Based on what you told me about the critical incident and my clinical observation of you at the time, I found nothing that would cause any psychological concerns.

If you would like any other information, please feel free to call me.

Sincerely,

s/
H. Michele Myers, LCSW

OAKBROOK 1. 670 E. 3900 South, Suite 105, Murray, Utah 84107.
801-261-4006. FAX 801-261-4236

Stephen L. Golding, Ph.D.
Diplomate
American Board of Forensic Psychology

Forensic Psychology
Psycholegal Consultation

698 N. East Capitol Blvd
Salt Lake City, Utah 84103
TEL: 801-363-2275
801-581-8028
FAX: 801-581-5841
E-mail: golding@psych.utah.edu

Web:www.xmission.com/~sgolding

RE: ROBERT JOSEPH

By Fax to 352-6641

Captain John Wittmack
Utah Transit Authority

Dear Sir:

I have been retained by Mr. Joseph and his attorney, Erik Strindberg, to perform a full psychological evaluation in reference to Mr. Joseph's civil rights violation case. Thusfar, I have interviewed Mr. Joseph once, and administered to him both the psychological Assessment Inventory and the MMPI-2. I have yet to interview Mr. Joseph in detail about the vents that surrounded his discharge, nor have I interviewed collateral sources, such as his supervisor and co-workers. Based upon the standardized interpretations of the psychological tests thusfar given, there are no indications that Mr. Joseph would be unsuited for employment as a police officer. When completed and authorized to do so, I will forward to you the complete psychological evaluation.

Sincerely yours,
s/
Stephen L. Golding, Ph.D.
Professor
Department of Psychology
Adjunct Professor of Law and Psychiatry

Registered Psychologist
State of Utah
Diplomate, American Board
of Forensic Psychology

SALT LAKE CITY CORPORATION
LAW DEPARTMENT

August 14, 2000

Jeffrey D. Gooch
Spence, Moriarty and Schuster
39 Exchange Place, Suite 101
Salt Lake City, Utah 84111

Roger H. Bullock
Strong & Hanni
9 Exchange Place #600
Salt Lake City, UT 84111

Re: Scott v. Salt Lake City Corporation and Joseph

Dear Gentlemen:

Salt Lake City Corporation has certain documentation in its possession that it believes may contain information relevant to the allegations and/or affirmative defenses in this matter. However, the information consists of Internal Affairs investigative files and psychological information regarding Mr. Joseph. The Internal Affairs files do not pertain to the incident involving Mr. Scott. Those files refer to other individuals who are not parties to the lawsuit and/or who may have certain privacy interests in that information. These privacy concerns also apply to Mr. Joseph both with respect to the Internal Affairs files and the psychological information. Salt Lake City Corporation is willing to produce the above described information, but requests that all parties enter into a Stipulated Confidentiality Agreement that results in a Protective Order covering the information.

I have included a proposed Stipulated Confidentiality Agreement and Protective Order for your review. If it is acceptable, please contact me and I will make arrangements to have the original delivered to you for your signature. As soon as the Confidentiality Agreement is in place, I will forward to you copies of the documents.

By this letter, I am requesting that Mr. Bullock provide a copy of the enclosed documents to Mr. Joseph in his capacity as a counterclaimant, pro se. If either of you have a copy of the counterclaim, please fax a copy to me since we have not seen it.

Very truly yours,
s/
Martha S. Stonebrook
Assistant City Attorney

OFFICE OF
DISTRICT ATTORNEY
FOR SALT LAKE COUNTY

DAVID E. YOCOM DISTRICT ATTORNEY
JERRY G. CAMPBELL CHIEF DEPUTY

JUSTICE DIVISION
MAIN OFFICE

RICHARD S. SHEPHERD
DIVISION DIRECTOR

MEMORANDUM

TO: DAVID E. YOCOM
FROM: ERNIE W. JONES
DATE: NOVEMBER 18, 1999
RE: PRESS RELEASE OFFICER ROBERT JOSEPH

The Salt Lake District Attorney has concluded that Salt Lake Police Officer Robert Joseph may have been legally justified in firing 11 shots from his pistol at Westley Scott. Based on the review of the evidence the District Attorney will move to dismiss Aggravated Assault charges currently pending against Officer Joseph. There is not sufficient evidence to prove beyond a reasonable doubt that Officer Joseph is guilty of Aggravated Assault.

Under the provisions of 76-2-402 UCA a peace officer is justified in using deadly force when:

1) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person or

2) Effecting an arrest, where the officer reasonably believes that deadly force is necessary to prevent an escape.

The evidence shows that Westley Scott put his vehicle in reverse and almost backed over Officer Joseph. the officer believed his life was in danger while hanging on to the car after being scooped by

Mr. Scott. Westley Scott told officers at the hospital that he hoped the officer was ok and that he did not mean to hurt the officer. Westley Scott attempted to flee after the officer directed him to stop the vehicle. Mr. Scott fled from the scene because there was an out standing warrant for his arrest on drug charges.

Tests completed by the State Crime Lab show the angle of the shots fired into Mr. Scotts vehicle was from "low to high." This analysis suggests that shots were fired while the officer was on the ground and in danger of being run over by the vehicle. While the injuries to Westley Scott were serious it appears that Mr. Scott created the situation which caused these injuries.

Officer Joseph was just justified in shooting Westley Scott because of the threat of being run over or injured by Mr. Scott's vehicle.

Also Officer Joseph was justified in using deadly force to effect the arrest and prevent the escape of Mr. Scott after the assault was committed.

The State believes there is insufficient evidence to suggest the officer acted in a criminal manner. Self defense was a valid claim in this case.

LONI F. DeLAND (0862)
MICHAEL R. SIKORA (6986)
Lawyer for Defendant
43 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 364-1333

THIRD JUDICIAL DISTRICT, MURRAY DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	DEFENDANT'S MOTION TO RECONSIDERATION TO
Plaintiff,	:	DISMISS
vs.	:	
ROBERT L. JOSEPH,	:	Case No. 991200423
Defendant.	:	Judge Michael K. Burton

MOTION

Defendant Robert L. Joseph filed his Motion to Dismiss on October 8, 1999. Oral argument was heard thereon by the Honorable Michael K. Burton on November 2, 1999. Said motion was denied. Defendant herein, through his lawyers, Loni F. DeLand and Michael R. Sikora, requests the Court to reconsider based upon the law as well as lay and expert witness testimony which will presented to the Court, if necessary, by pretrial evidentiary hearing. Primarily, this motion is based upon defenses available to a peace officer defendant pursuant to § 76-2-404(1) (b)(c) justifying the use of deadly force.

DATED: November 23, 1999.

s/
Loni F. DeLand

Michael R. Sikora
Lawyers for Defendant

ERNIE JONES
Assistant Salt Lake District Attorney
231 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

THIRD JUDICIAL DISTRICT, MURRAY DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff,	:	STATE'S RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER
vs.	:	
ROBERT L. JOSEPH,	:	Case No. 991200423
Defendant.	:	Judge Michael K. Burton

The State of Utah, through Assistant Salt Lake District Attorney Ernie Jones, upon further review of the evidence adduced at the preliminary hearing herein, as well as evidence based upon expert reconstruction of the underlying incident herein and upon further review of the peace officer use of deadly force statute, *i.e.* § 76-2-404(1) (b)(c), does hereby submit that defendant's Motion to Dismiss is well taken, believes the same is in the interests of justice, is well-founded in the insufficiency of the state's evidence to convict and does therefore not object to the court dismissing the charge against defendant with prejudice.

DATED: November 23, 1999.

s/_____
Ernie Jones
Assistant Salt Lake District Attorney

LONI F. DeLAND (0862)
MICHAEL R. SIKORA (6986)
Lawyer for Defendant
43 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 364-1333

THIRD JUDICIAL DISTRICT, MURRAY DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	ORDER OF DISMISSAL
Plaintiff,	:	
vs.	:	
ROBERT L. JOSEPH,	:	Case No. 991200423
Defendant.	:	Judge Michael K. Burton

Based upon defendant's Motion to Reconsider Motion to Dismiss filed November 23, 1999 and the State's response thereto wherein the State acquiesces to the reconsideration of Defendant's Motion to Dismiss and agrees that the Court should grant said motion the court does hereby

ORDER, ADJUDGE AND DECREE that the Information charging defendant Robert L. Joseph with aggravated assault, a second degree felony, is hereby dismissed with prejudice.

DATED: November 23, 1999.

BY THE COURT:

s/_____
Judge Michael K. Burton
Third District Court

Cleared officer blasts department

by Gib Twyman
Deseret News Staff Writer

No sooner did cleared officer Rob Joseph bounce off the ropes from excessive-force charges than he came out swinging Wednesday against Salt Lake Police Department superiors.

"I can only say that the police administration misled the public, misled the courts, tampered with evidence, tampered with witnesses and obstructed justice," Joseph,38, said in an emotional press conference Wednesday at the offices of defense attorney Loni F. DeLand.

"Today I publicly call for an FBI investigation and for the attorney general to look at the way this case was handled," said Joseph, a two-year Salt Lake police officer, relieved of his duties after firing 11 shots and injuring a fleeing Westley Scott, 21, Holladay, after a traffic stop March 26 near 2300 S. 700 East.

Third District Judge Michael K. Burton granted a defense motion Tuesday to dismiss charges of aggravated assault, a second-degree felony, against Joseph.

It was the second high-profile court case this week exonerating an officer accused of using excessive force. On Monday Salt Lake officer Lane Heaps was acquitted by a jury of misdemeanor assault in connection with another traffic stop.

Salt Lake Police Chief Ruben Ortega issued a statement staunchly denying mishandling in either case.

"The factors that led to their termination have not changed,"Ortega said, "Their firings were appropriate in the interest of public safety and in the preservation of the integrity of the police department.

"In the interest of fairness, no further comments should be made concerning these cases since their terminations have been appealed, and we intend to defend the terminations at the time of the Civil Service (Commission) hearings. The filings of criminal charges against Rob Joseph and Lane Heaps were at the sole discretion of the Salt Lake District Attorney's Office."

Deputy district attorney Ernie Jones said there wasn't enough evidence to demonstrate Joseph violated the Utah Criminal Code's deadly force statute.

The statute states an officer can use deadly force if he fears being killed, incurring bodily harm or to prevent a suspect from fleeing.

"After the crime lab's findings it became obvious the use of deadly force was justified," Jones said. "But I take issue with any notion of blaming law enforcement for these charges. The police took three weeks to investigate the case, and I think they did a good job. Even if you think the investigation was sloppy or bad, to say there was some kind of conspiracy is just wrong."

DeLand said the information investigators gathered in the case was "erroneous and incompetent."

"They got stuck with it and realized it wasn't going to fly," DeLand said.

There were two key questions in the case. One, whether Joseph fired from the ground after Scott gunned his car in reverse, trying to shake the officer off the car. Two, whether Joseph hopped the car rail, clinging to the roof with his gun hand as the driver's side door swung at him.

"The detailed crime lab work made it obvious he was not standing. All the lines of fire were low to high," Jones said. "And marks along the top of the car showed his gun had dragged the roof of the car. Clearly he was hanging on to prevent a threat to his life."

"I felt like I'd been in a bullfight and lost." Joseph said. "I guess I was in a fight with a rather large, deadly weapon. I did what I could to protect my life while trying to protect the public from a drunk and speeding driver." -[Deseret News November 24, 1999].

STEVEN W. ALLRED, #0060
Chief Deputy City Attorney
Attorney for Defendant
451 South State, Suite 505
Salt Lake City, UT 84111
Telephone: (801) 535-7788

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LONI F. DeLAND and ROBERT LEON JOSEPH Plaintiffs, vs. SALT LAKE CITY CORPORATION, a body corporate and politic, Defendant.	)	AFFIDAVIT OF ERNEST W. JONES Case No: 000903452 Judge Ronald E. Nehring

---

STATE OF UTAH)
: ss.
County of Salt Lake)

Being first duly sworn on oath, Ernest W. Jones deposes and says:

1. Affiant has personal knowledge of the matters contained herein.

2. I am a resident of Weber County, Utah.

3. I am currently a District Judge with the Second Judicial District Court in Ogden, Utah.

4. I was the prosecutor assigned by the Salt Lake County District Attorney's office to prosecute the aggravated assault charge filed against the Plaintiff in this case.

5. I did not "screen" the case initially. Two other prosecutors within the District Attorney's Office reviewed the information provided by the Salt Lake City Police Department and determined, by issuing a criminal information, that there was probable cause that the Plaintiff committed the crime of aggravated assault and there was a reasonable probability of conviction on that charge.

6. After the case was assigned to me, I met with the witnesses and presented the state's case at the preliminary hearing before the Honorable Joseph C. Fratto, District Judge. Plaintiff was represented by Lonnie F. DeLand, a very capable and experienced criminal defense attorney.

7. At the preliminary hearing I called two witnesses who were sworn and testified before Judge Fratto about the events regarding Plaintiff's shooting of a suspect.

8. At the conclusion of the presentation of evidence, Judge Fratto ruled that there was probable cause to believe that the offense charged in the information, aggravated assault, a second degree felony, was committed and there was probable cause to believe that the Plaintiff had committed it and bound him over for trial before the Honorable Michael Burton.

9. Mr. DeLand filed a Motion to Dismiss before Judge Burton, who denied it after briefing by both sides.

10. The State crime lab performed a laser reconstruction of the bullet strikes from Officer Joseph's weapon on the vehicle. The laser reconstruction showed the shots were fired while Officer Joseph was sitting or laying

on the ground. The trajectory was "low to high" in angle.

11. The results of this reconstruction appeared to contradict the State's earlier theory which was that Officer Joseph was standing up when he fired at the victim's vehicle.

12. I reviewed the case with a committee of prosecutors from the Salt Lake County District Attorney's Office and we concluded that the case should be dismissed.

13. At all times subsequent to the charges being filed against Officer Joseph, the state supplied everything available to it to Mr. DeLand, including the result of the Utah Crime Lab laser reconstruction.

14. I communicated to Officer Joseph's attorney, Loni DeLand, that I intended to dismiss the charges based upon the prosecutors committee's recommendation and my own analysis of the case.

15. Mr. DeLand requested that he be permitted to file a Motion to Reconsider his previous Motion to Dismiss.

16. I acquiesced in Mr. DeLand's request although my normal practice would have been to file a dismissal of charges.

17. Mr. DeLand also prepared the state's response to his Motion to Reconsider which I executed.

18. In acquiescing to Mr. DeLand's request, I did not intend to provide a basis upon which Mr. DeLand could make a claim for reimbursement of attorney's fees and costs.

DATED this 6th day of April, 2001

s/
ERNEST W. JONES

SUBSCRIBED AND SWORN to before me this 6 day of April, 2001.

(Seal)

s/
NOTARY PUBLIC, residing in

My Commission Expires:
11/27/02

STEVEN W. ALLRED, #0060
Chief Deputy City Attorney
Attorney for Defendant
451 South State, Suite 505
Salt Lake City, UT 84111
Telephone: (801) 535-7788

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LONI F. DeLAND and ROBERT LEON JOSEPH Plaintiffs, vs. SALT LAKE CITY CORPORATION, a body corporate and politic, Defendant.	)	SUPPLEMENTAL AFFIDAVIT OF ERNEST W. JONES Case No: 000903452 Judge Ronald E. Nehring

---

STATE OF UTAH)
: ss.
County of Salt Lake)

COMES NOW Ernest W. Jones and, being first duly sworn on oath, deposes and says:

1. Affiant has personal knowledge of the matters contained herein.

2. I have reviewed the Affidavit of Loni F. Deland dated the 4th day of March 2002.

3. Mr. DeLand correctly states that I contacted him and informed him that a decision had been made by the

District Attorney's Office to dismiss the charges against Mr. DeLand's client.

4. Mr. DeLand correctly states that the decision had been made "some time ago" by the District Attorney's Office to dismiss the charges.

5. Mr. DeLand is not correct when he states that I agreed with his original Motion to Dismiss. Had I agreed with it I would not have successfully opposed it.

6. Mr. DeLand is not correct when he states that he reasoned with me that the "likelihood of conviction was nil" because the decision had already been made to dismiss the charges.

7. I did not feel that the "testimony of the State's lead investigator demonstrated incompetent investigative techniques and conclusions." In fact, it was those very techniques and conclusion that convinced a committee of prosecutors of the District attorney's Office to conclude that the charges should be dismissed.

8. I have taken the opportunity to review relevant documents relating to the investigation in this matter, including specifically the police report of Salt Lake City Police Officers Shane Jones and Eric Irvine which states that Cal Ostler, a company representative from LumaChem, Inc., provided four lasers to confirm the direction and path of the bullets in order to confirm the dowels and rods test that had been previously performed by the officers. Photo's were taken and were submitted to the state crime lab. Copies of those police reports are attached hereto. Contrary to Mr. DeLand's speculation in paragraph 15 of his Affidavit, my review affirms my earlier statement that a laser test was performed by police investigators.

9. I have also reviewed the Report prepared by the State Crime lab showing that the bullet trajectories were slightly upward direct, that is, from "low to high" as I had previously testified. A copy of that report is attached hereto.

10. I have also reviewed copies of photographs of the laser tests and the dowel and rod test that I also reviewed as part of my decision to dismiss the charges against Mr. DeLand's client. These photographs led me to conclude that the shots fired were from "low to high" and the state's earlier analysis that Officer Joseph was standing when he fired the shots was incorrect.

11. From these tests and photographs, I concluded that it was more likely than not that Officer Joseph was either falling down or was on the ground and that such facts were not inconsistent with his statement. Accordingly, I determined, after consultation with a review committee of prosecutors, to dismiss the charges against Mr. DeLand's client.

12. I did not rely on any information or arguments provided by Mr. DeLand in concluding that the charges should be dismissed.

13. I agreed to permit Mr. DeLand to prepare the necessary documents to effectuate dismissal as a matter of convenience.

14. As a prosecutor, I was familiar with statutory reimbursement requirements for the successful defense of criminal prosecution of public employees.

15. I am also familiar with the exception of the reimbursement requirements when the dismissal is upon the application or motion of the prosecuting attorney.

16. In permitting Mr. DeLand to prepare and file the documents to make my decision to dismiss the charges, it was not my attention to circumvent the reimbursement exception because I believed the exception was applicable.

DATED this 17 day of April, 2002.

s/
ERNEST W. JONES

SUBSCRIBED AND SWORN to before me this 17 day of April, 2002.

(Seal) s/
NOTARY PUBLIC, residing in

My Commission Expires:
8-20-02

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LONI F. DeLAND and ROBERT LEON JOSEPH	)	
	)	MINUTE ENTRY
Plaintiffs,	)	
	)	CASE NO: 000903452
vs.	)	
SALT LAKE CITY CORPORATION,	)	
	)	
Defendant.	)	Judge Ronald E. Nehring
	)	

This matter is before me on the parties' cross motions for summary judgement. Oral arguments were heard on November 15, 2002 after I granted plaintiffs time to submit additional briefing. Now, having considered all counsels' submissions as well as the relevant legal authority, I ruled as stated herein.

The facts are as follows: On April 23, 1999 plaintiff Loni DeLand undertook legal representation of plaintiff Robert Joseph — a Salt Lake City police officer. Mr. Joseph was charged with aggravated assault stemming from an incident where, acting in his capacity as a Salt Lake City police officer, he used deadly force to stop a fleeing felon.

On October 8, 1999, Mr. DeLand filed a Motion to Dismiss the charges, arguing that Mr. Joseph's use of force was substantially justified. Judge Michael Burton denied plaintiff's motion on November 2, 1999. Soon thereafter, DeLand requested that Judge Burton reconsider the Motion to Dismiss. At that time, the City acquiesced in the reconsideration and conceded that plaintiff's motion was well taken. Accordingly, on November 23, 1999 Judge Burton signed and entered an Order, dismissing the charges against Joseph.

On December 9, 1999 plaintiffs made a request and demand upon defendant Salt Lake City Corporation for the reimbursement of fees and court costs incurred pursuant to Utah's law authorizing reimbursement of legal fees, Utah Code Ann. § 63-30a-1 (2000 Supp.) ("Reimbursement Act"). Salt Lake City denied the request. This lawsuit followed.

Plaintiffs base their claim to reimbursement of fees and costs on Utah Code Ann. § 63-30a-2(1).

That provision states:

If a state grand jury indicts, or if an information is filed against, an officer or employee, in connection with or arising out of any act or omission of that officer or employee during the performance of his duties, within the scope of his employment, or under color of his authority, and that indictment or information is quashed or dismissed or results in a judgement or acquittal, unless the indictment of information is quashed or dismissed upon application or motion of the prosecuting attorney, that officer or employee shall be entitled to recover reasonable attorneys' fees and court costs necessarily incurred in the defense of that indictment or information from the public entity, unless the officer or employee is found guilty of substantially the same misconduct that formed the basis for the indictment or information. (Emphasis added).

Defendant resists Plaintiffs' claims to relief under this statute because: (1) it was the prosecutor's decision to dismiss the charges against Joseph; (2) plaintiffs failed to comply with the relevant provisions of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-36 and 63-30-37; and (3) plaintiff cannot produce evidence sufficient to support his requested award. I will address each argument in turn below.

1. Who Moved To Dismiss The Charges?

Pursuant to Utah Code Ann. § 63-30a-2(1) plaintiffs may recover fees only if the indictment or

information against Joseph was not "quashed or dismissed upon application or motion by the prosecuting attorney." The prosecutor, Ernie Jones, claims that he communicated his intent to dismiss the charges to DeLand, and Deland requested Jones' permission to prepare and file a Motion To Reconsider the previously denied Motion to Dismiss. See, Affidavit of Ernest W. Jones ¶ 13, 14. Defendant insists that this exchange demonstrates that Mr. Jones, not Mr. DeLand, actually dismissed the motion and therefore plaintiffs should not be entitled to reimbursement.

Defendants ask that I place little is any weight upon the fact that it was Mr. DeLand who actually prepared and submitted the dismissal motion to the Court. Arguing that DeLand would not have filed the motion absent the knowledge that Jones intended to dismiss the case, defendants claim DeLand's actions were merely "administrative." I disagree.

The plain language of § 63-30a-2 insulates a governmental agency from exposure to reimbursement for attorney's fees "that is quashed or dismissed upon application or motion of the prosecuting attorney." Rule 12 of the Utah Rules of Criminal Procedure governs motions in criminal cases.

Rule 12 (a) states, "[a]n application to the court for an order shall be by motion." I conclude that the

"application or motion" contemplated by § 63-30a-2 is that which conforms to the mandates of Rule 12.

This includes the requirement that "[a] motion other than one made during trial or hearing shall be in

writing unless the court otherwise permits." U.R.Cr.P 12(a). Here, the written motion to reconsider was

brought by Mr. DeLand. There is noting in the language of § 63-30a-2 which suggests that a court may look behind the face of the written motion and evaluate the degree to which a prosecutor contributed to or

acquiesced in the motion resulting in the dismissal of a charge subject to attorney's fee reimbursement.

While Mr. Jones endorsed the dismissal, he did nor prepare the motion nor did he bring it before Judge Burton. This case was clearly dismissed upon motion and application of Mr. DeLand and not upon application or motion of the prosecuting attorney.

2. Governmental Immunity Act

Next, defendants challenge plaintiffs award of fees under Utah's Governmental Immunity Act ("Act"), Utah Code Ann. §§ 63-30-36 and 63-30-37. Section 63-30-36 (2) (a) requires that:

[b]efore a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend him: (I) within ten days after service of process upon him; (ii) withiiin a longer period that would noprejudice the governmental entity in maintaining a defense on his behalf; or (iii) within a period that would not conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved. Under this section, a officer or employee's failure to make a timely request for defense excuses the governmental entity from defending the employee or paying any judgement, compromise or settlement reached. Utah Code Ann. § 63-30-36 (2) (b). Defendants argue that a claimant under the Reimbursement Act, Mr. Joseph was required to comply with the notice requirements of the Governmental Immunity Act and that his failure to provide timely notice bars his recovery of fees and costs. Defendants base this contention on the language found in Utah Code Ann. § 63-30a-3 (1) requiring that "[a] request for reimbursement of attorneys' fees and court costs shall be filed in the manner provided in §§ 63-30-36 and 36-30-37."

The linkage between § 63-30a-2, which authorizes reimbursement of legal fees and costs to public officers and employees, and §§ 63-30-36 and 63-30-37 is ill-fitting, making any meaningful interpretation of their interplay daunting. Section 63-30-36 expressly concerns tendering the defense of actions brought

against officers or employees to a governmental entity. In this respect, the statute reasonably requires of officers and employees what is typically required of insureds under the terms of liability insurance contracts generally: that the entity which may be required to pay a judgement be promptly advised of nature of the claim and afforded an opportunity to direct the defense.

The Reimbursement Act differs fundamentally from the provisions of the Governmental Immunity Act with which it is to partner. While the Governmental Immunity Act is clearly directed to civil actions in which officers or employees are named as defendants, the Reimbursement Act's scope is limited to criminal proceedings brought against governmental officers or employees. It would be highly unusual, even unprecedented, to tender the defense of a criminal matter to a governmental entity.

The Reimbursement Act recognizes the practical reality that a timely tender of a criminal defense is not required when it characterizes the payment of attorney's fees and costs as "reimbursement." Utah Code Ann. § 63-30a-3 (1997). The common dictionary definition of "reimbursement" is a repayment for money spent. The Reimbursement Act therefore clearly contemplates that an officer or employee charged with a crime will retain counsel free of the duty to make a written request for defense within ten days as required by § 63-30-36 (2) (a) (I) in civil actions.

It is similarly unlikely that the savings provision of § 63-30-36 (2) (a) (ii), permitting a tender of a defense beyond ten days but before the governmental entity would be prejudiced in maintaining a defense, would apply since reimbursement is only available upon dismissal or acquittal, outcomes which could not be prejudicial to the governmental entity under any circumstances.

Accordingly, whatever may have been intended by the "in the Banner provided in sections 63-30-36 and 63-3-37" language of § 63-30a-3 (1), it was not intended to require reimbursement claimants to satisfy the notice requirements of § 63-30-36 (2).

3. <u>Support For Fees Requested</u>

Defendant's final argument hinges on the "reasonableness" of DeLand's request for attorney's fees. Utah Code Ann. § 63-30a-2. DeLand request reimbursement of $51,500.

At this time I am not prepared to address the issue of reasonableness. Rule 4-505 (1) of the Utah Rules of Judicial Administration, states that the reasonableness of fees should be determined by considering several factors including the nature of the work performed and the number of hours spent. Plaintiff fails to provide evidence of either.

Consequently, I request that the parties submit additional briefing and schedule argument if necessary on the issue of the reasonableness of plaintiff's reimbursement fees.

Dated this 24 day of January, 2003.

BY THE COURT:

s/
RONALD E. NEHRING
DISTRICT COURT JUDGE

State of Utah

Department of Public Safety
Peace Officer Standards and Training

Sidney P. Groll
Director
Box 141775
4525 South 2700 West
Salt Lake City, UT 84114-1775
(801) 965-4595
(801) 965-4619 FAX

Robert L. Joseph
1156 East Lost Eden Dr.
Sandy, Utah 84094

November 1, 2000

Dear Mr. Joseph:

Peace Officer Standards and Training has concluded it's investigation surrounding the shooting incident involving you on March 26, 1999.

After carefully reviewing the facts surrounding this case, POST finds no cause to take action against your peace officer certification. POST's decision is based upon:

- The Salt Lake District Attorney's Office dismissed all criminal charges, because they believed there was insufficient evidence for a criminal prosecution, and that self defense was a valid claim.

- The evidence shows that you did not act outside the provisions of 76-2-402 UCA.

- You were reinstated with no action taken against you by the Salt Lake City Police Department.

This concludes POST's involvement in this case. POST wishes you the best of luck in your future endeavors. Should you have any questions concerning this action please contact Certification

Supervisor Kevin Nitzel at 965-4997.

Sincerely,

s/
Kevin Nitzel
Certification Supervisor

s/
Capt. Steve DeMille
Deputy Director, POST

cc: file

No. 02-1781

IN THE

Supreme Court of the United States

ROBERT L. JOSEPH,

Petitioner,

v.

SALT LAKE CITY CIVIL SERVICE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF UTAH

BRIEF IN OPPOSITION

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Respondent, Salt Lake City Corporation (hereinafter "the City") files this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner, Robert L. Joseph (hereinafter "Joseph").

OPINIONS BELOW

Course of Proceedings

Joseph appealed Police Chief Connole's decision to terminate his employment to the Salt Lake City Civil Service Commission ("the Commission") on April 5, 2000. (Pet. App. 19-23). On March 5, 2001, the City filed a Motion to Dismiss Appeal for Failure to Cooperate with Discovery. After repeated failure by Joseph to cooperate in discovery, on March 15, 2001, the parties presented to the Commission a Stipulated Motion to Continue Hearing that contained a representation by Joseph that he would produce *all* the discovery requested by the City by March 30, 2001. The Commission accepted the stipulated motion to continue the hearing but the Commission ordered that if the City did not receive all the discovery it had requested by the March 30 deadline, Joseph's case would be dismissed. After Joseph's failure or refusal to comply with the stipulation, on April 9, 2001, the Commission issued an Order of Dismissal. (Pet. App. 12-13). On April 23, 2001, the Commission issued an Order Denying Joseph's Motion to Strike Order of Dismissal. (Pet. App. 10-11).

Joseph appealed the Commission's decision to the Utah Court of Appeals. On July 26, 2002, the Court of Appeals issued a decision affirming the Commission's decision. (Pet. App. 3-9). That decision has been published and can be found at *Joseph v. Salt Lake City Corporation*,

2002 UT App 254, 53 P.3d 11. Joseph filed a Petition for Rehearing with the Court of Appeals. That Petition was denied. (Resp. App. 1). The Utah Supreme Court denied Joseph's Petition for Writ of Certiorari. (Resp. App. 2).

JURISDICTION

The issues raised by Joseph are insufficient to confer jurisdiction upon this Court and do not raise any significant federal issues that permit this Court to accept jurisdiction.

This Court, with "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992), "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997). Petitioner Joseph did not raise or present any federal claims or issues to the Utah courts below.

Rule 10 of the Rules of the Supreme Court reflects that a Petition for Writ of Certiorari will only be granted for "compelling reasons." Although Rule 10 lists three categories of consideration, none of the three questions raised by Joseph in his Petition fit within any of those categories. The City respectfully submits that Joseph has failed to present any compelling reasons sufficient to warrant the exercise of this Court's discretion to consider his Petition.

Joseph has also failed to meet his obligations under Rule 14.1(g) of the Rules of the Supreme Court. He must specify when the federal question sought to be reviewed was raised and the manner or method of raising the question so as to show that the federal question was timely and properly raised

such that this Court has jurisdiction to review the state court's judgment. The petitioner's burden has been described as the need to demonstrate that the petitioner presented the particular claim being raised in the Petition with "fair precision and in due time." *Adams*, 520 U.S. at 87, quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 495 S. Ct. 61, 63, 73 L. Ed. 184 (1928).

Joseph's Petition should be denied because he has failed to raise any federal questions or present compelling issues as to why his Petition should be granted.

STATEMENT OF THE CASE

Rule 24.2 of the Rules of the Supreme Court of the United States provides that a respondent's brief need not include a concise statement of the case unless the respondent is dissatisfied with the petitioner's presentation of the statement of the case. The Respondent City is dissatisfied with Joseph's statement of the case in large part because Joseph relies on information and documents to support arguments that were never made part of the record before the Civil Service Commission or Court of Appeals. Also, Joseph devotes most of his petition to reiterating his perception of the facts relating to the March 26, 1999 shooting incident that ultimately lead to a finding by the Chief of Police that Joseph violated two police policies and resulted in the imposition of a twenty-day suspension. That matter (hereinafter referred to as "the twenty-day suspension appeal") is not before this Court, having been fully adjudicated in favor of the City and culminating in this Court denying certiorari on April 21, 2003, No. 02-1211.

Nature of the Case

On July 16, 1999, Police Chief Ruben Ortega terminated Robert Joseph's employment with Salt Lake City Corporation because he felt that Joseph had violated the Police Department's deadly force policy and the policy that prohibited firing at or from a moving vehicle. These violations, coupled with Joseph's employment history, caused Chief Ortega to conclude that Joseph could no longer serve effectively as a Police Officer. Chief Ortega left office as Chief of Police on or about January 1, 2000.

On January 3, 2000, acting Chief A. M. "Mac" Connole reviewed all matters known to be relevant concerning Joseph's employment termination. Based upon this review, Chief Connole amended the City's decision and reinstated Joseph, subject to (1) the finding that Joseph's use of deadly force was not within police policies and (2) the imposition of a 20-day suspension without pay for the policy violations.

Chief Connole also required Joseph to submit to a fitness for duty examination with Dr. David McCann, a Utah psychiatrist. Joseph was deemed psychologically unfit to be a police officer by Dr. McCann. The Utah Court of Appeals, in its published decision upholding the Commission's dismissal of the termination appeal as a discovery sanction, quoted Dr. McCann's conclusion in *Joseph v. Salt Lake City Civil Service Commission*, 53 P.3d 11, 13-14 (Utah App. 2002):

> In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City) determining that he had acted unprofessionally and had violated the City's

> deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who, in March of 2000, submitted to the City the following conclusions regarding Joseph:
>
> [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and in other incidents. Officer Joseph's personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.

Joseph's failure to pass the fitness for duty examination resulted in his termination from Salt Lake City Corporation on March 31, 2000.

Joseph appealed the termination to the Civil Service Commission on April 5, 2000 by filing a Request for Appeal Hearing with the Commission (hereinafter "the termination appeal"). (Pet. App. 19-23). Thereafter, Joseph refused to

cooperate with discovery, ignoring at least 7 written discovery requests. *Joseph*, 53 P.3d at 15. On April 9, 2001, the Civil Service Commission dismissed Joseph's appeal for failing to comply with the Commission's March 15, 2001 Order by failing to provide all of the discovery requested by Salt Lake City Corporation by the March 30, 2001 deadline established by the order of the Commission. (Pet. App. 12-13). Joseph filed a "Motion to Strike Order of Dismissal and to Allow Hearing to Go Forward" that the City opposed. After a hearing on that motion, the Commission issued an Order Denying Joseph's Motion to Strike Order of Dismissal on April 23, 2001. (Pet. App. 10-11).

REASONS FOR DENYING THE PETITION

A. The doctrine of *stare decisis* concerning an agency's interpretation and application of the law under the Utah Administrative Procedures Act ("UAPA") does not apply in this case.

The first question Joseph places before this Court is: "Did the Utah Court of Appeals follow *stare decisis* concerning interpretation and application of administrative law." According to Joseph, the Utah Court of Appeals erred in not interpreting and applying the law established under UAPA when it upheld the Salt Lake City Civil Service Commission's decision to dismiss Joseph's appeal as a discovery sanction. Joseph's analysis is unpersuasive because the UAPA does not apply to the Civil Service Commission, a municipal tribunal.

The Utah Court of Appeals, in *Lucas v. Murray City Civil Service Commission*, 949 P. 2d 746, 755 (Utah App. 1997), recognized that the Murray City Civil Service Commission

was "a local, municipal tribunal of limited jurisdiction." *Id.* As such, the court concluded that "[t]he Commission is neither a court of law nor a state administrative agency subject to the Utah Administrative Procedures Act (UAPA)." *See also Tolman v. Salt Lake County Attorney*, 818 P.2d 23 (Utah App. 1991) (UAPA applies only to administrative actions of state agencies and does not apply to local administrative bodies). Contrary to Joseph's statement on page 17 of his Petition, the Civil Service Commission is not controlled by the UAPA. Section 63-46b-2(1)(b) defines the term agency under the Act and excludes tribunals such as municipal Civil Service Commissions:

> **"Agency"** means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons action on behalf of or under the authority of the agency head, but **does not mean** the legislature, the courts, the governor, **any political subdivision of the state, or any administrative unit of a political subdivision of the state.**

(Emphasis added).

The Utah Court of Appeals correctly analyzed and applied the law appropriately in upholding the Civil Service Commission's dismissal of Joseph's appeal as a discovery sanction. The Utah Administrative Procedures Act does not control decisions made by the Civil Service Commission and the Utah Court of Appeals appropriately did not use the UAPA in its analysis.

B. Res judicata precludes the issues of qualified immunity and self defense to be raised in this matter.

Joseph was terminated for failing a fitness for duty evaluation that found him to be psychologically unfit to be a police officer. The Civil Service Commission dismissed Joseph's appeal of his employment termination as a discovery sanction for willfully refusing to cooperate with discovery. The issues of whether or not Joseph had acted in "self-defense" in the March 26, 1999 shooting incident or was justified in his actions were never at issue in Joseph's appeal of his employment termination. Rather, those issues were fully adjudicated in the twenty-day suspension appeal and those appeals are final.

Joseph asks this Court to declare that his acts on March 26, 1999 were "in self-defense" and justified and argues that all adversarial proceedings should have been barred as a result. Joseph had his opportunity to present the same theories to the Salt Lake Civil Service Commission in the twenty-day suspension appeal. The Civil Service Commission was not persuaded by the evidence that Joseph acted in self-defense or that his shooting was justified. Likewise, the Utah Court of Appeals was not convinced that the Commission abused its discretion by failing to weigh all the evidence. It concluded that Joseph violated the Department's deadly force policy and that his use of deadly force was unjustified and affirmed the Civil Service Commission's decision. Both the Utah Supreme Court and this Court have denied Joseph's Petitions for Writ of Certiorari. Thus, Joseph has fully pursued his arguments that he acted in self-defense and that he was justified in his actions and has lost each and every time. He is barred now from raising those issues in this Court when those issues were not ever raised in the termination appeal.

It is well recognized that "[r]es judicata, also called claim preclusion, precludes a party from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits." *King v. Union Oil Co.*, 117 F.3d 443, 445 (10th Cir. 1997). The United States Supreme Court has recognized that res judicata principles apply to administrative proceedings:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

University of Tennessee et al., v. Elliott, 478 U.S. 788, 797-98 (1986) quoting *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). The Court in *Elliott* opined:

> [G]iving preclusive effect to administrative fact-finding serves the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources is equally implicated whether fact-finding is cone by a federal or state agency.
>
> * * *
>
> Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties

> have had an adequate opportunity to litigate," *Utah Construction & Mining Co.*, at 422, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts.

Elliott, 478 U.S. at 798-99.

Here, Joseph wants this Court to declare that he was justified in shooting as he did and that he acted in self-defense, thereby triggering the qualified immunity defense, and would have this Court undo all the previous litigation and court rulings as if they never occurred because, as Joseph believes, the City should have been barred from seeking disciplinary action against him. The essential fact that Joseph refuses to accept is that he was disciplined for violating two police policies and that decision, in the twenty-day suspension appeal, was upheld by the Civil Service Commission and the Utah Court of Appeals. The Utah Supreme Court and this Court declined to revisit the matter.

The issues that Joseph was acting in self-defense and was therefore justified in shooting were not before the Civil Service Commission or any of the state appellate courts in the termination appeal, having been fully adjudicated in the twenty-day suspension appeal. Thus, they are not properly before this Court and do not present appropriate issues for review.

C. The Health Information Portability and Accountability Act ("HIPAA") does not apply to this case for a number of reasons.

Joseph's "HIPAA" argument is raised for the first time in his Petition to this Court. Although not properly before this Court, Joseph's newly presented argument regarding alleged HIPAA violations cannot be ignored, not only because of its factual inaccuracies but also because the law is simply contrary to Joseph's position.

1. Joseph Had No Expectation of Privacy

Joseph would have this Court believe that the City has released information which it knew was private and in which Joseph claimed a privacy interest. The facts reveal an opposite conclusion.

In other litigation prosecuted by Westley Scott, the individual shot by Joseph, the City retained independent counsel to represent Joseph. On August 14, 2000, the City's attorneys requested that all parties enter into a Stipulated Confidentiality Agreement and Protective Order regarding certain Police Department Internal Affairs files and psychological information regarding Joseph. Joseph attaches that request as Pet. App. 69 and suggests that, thereafter, the City and its attorney "did little to protect the information from wrongful disclosure to the public at large." (Petition at p. 14). What Joseph conveniently fails to add is that after receiving no response from Joseph or his attorney to the August 14, 2000 request, the City again requested their cooperation in obtaining a Protective Order. (Resp. App. 2) On January 25, 2001, the City received this response from Joseph's attorney – "This letter is to advise that Rob Joseph does not require a protective order." (Resp. App. 3)

From these exchanges, it is evident that (1) the City initiated and furthered the effort to obtain a protective order and (2) Joseph chose not to participate in such efforts. It is apparent that the City exhibited appropriate caution but Joseph declined such efforts. He should not now be heard to complain.

2. Joseph's Alleged Medical Information Was Not Released By Counsel

Joseph repeatedly alleges that counsel has and continues to wrongfully disclose Joseph's protected health information. That is not the case.

In the Civil Service Commission proceeding concerning the termination appeal, the City set forth Dr. McCann's conclusion in its Response to Joseph's appeal (Pet. App. 14-17). That conclusion was set forth verbatim in *Robert L. Joseph v. Salt Lake City Civil Service Commission*, 2002 UT App. 254 ¶ 2, 53 P.3d 11, 13-14. (Pet. App. 3-9). Recently, that same conclusion was set forth in an order issued by the Honorable Dale A. Kimball in Joseph's pending federal court RICO lawsuit against the City, its past and present Mayors and a host of police officials. (Resp. App. 4).

In the termination appeal proceedings, Joseph was represented by two separate, competent attorneys and, for a time, by himself, pro se. At no time did either attorney, on behalf of Joseph, or did Joseph as attorney pro se, seek to seal the City's Response to Joseph's Appeal, the only part of the record where any part of Dr. McCann's report appears. On appeal, the City was required to forward the Civil Service record to the Utah Court of Appeals, including the City's Response to the Civil Service Commission Appeal which

contained Dr. McCann's conclusion. Again, Joseph took no steps to seal such material until *after* the Court of Appeals issued its opinion. The Court declined Joseph's invitation to redact the quoted provision from its opinion.[1]

Clearly, the City did nothing but provide the official record to the Utah Court of Appeals after Joseph filed his appeal. The City cannot be faulted for doing what it is required to do.

3. HIPPA Is Inapplicable

In his HIPAA allegations, Joseph demonstrates a gross misunderstanding of the Act. The HIPPA provisions were not in effect at the relevant times. Joseph erroneously claims that the City released materials that are subject to HIPAA's privacy rules. In addition to the other reasons why such allegations are in error, the privacy rules did not go into effect until April 14, 2003. *See* 45 C.F.R. 164.534. Any alleged release certainly took place prior to that date and HIPAA's privacy rules did not pertain.

HIPAA does not apply to these circumstances. Joseph's allegation that the City violated the privacy rules of HIPAA is misguided. Such privacy rules apply only to "covered entities," i.e. health plans, health care clearing houses and health care providers who conduct financial and administrative transactions such as electronic billing. *See* 45 C.F.R. 160.10. While the City is not a "covered entity",

1. It is noted that the City did not refer to Dr. McCann's evaluation in its Brief before the Court of Appeals. The City simply stated that "on April 19, 2000, the City filed its response to the [Civil Service Commission] Appeal." The Court *sua sponte* searched the record for Dr. McCann's conclusion.

its health plan is subject to the privacy rules. However, no part of Joseph's City-administered health plan was made public, either before HIPAA or after. The fitness for duty evaluation performed by Dr. McCann was not administered through the City's health plan but, rather, for employment-qualification purposes.

Formal complaints for alleged privacy rules violations are filed with the privacy officer of the covered entity or with the Department of Health and Human Services. *See* 45 C.F.R. 160.306(a). The privacy rules are enforced by the Department's Office for Civil Rights. *See* 65 Fed. Reg. at 82472.

Joseph, contrary to these procedures, seeks to privately enforce the privacy rules. HIPAA does not provide a private cause of action. *Ass'n of American Physicians and Surgeons v. United States Dept. of Health and Human Services*, 224 F. Supp. 2d 1115, 1129 (Tex. 2002); *O'Donnell v. Blue Cross Blue Shield*, 173 F. Supp. 2d 1176 (Wyo. 2001); *Means v. The Independent Life and Accident Insurance Co.*, 963 F. Supp. 1131, 1135 (Ala. 1997); *Wright v. Combined Insurance Co.*, 959 F. Supp. 356, 363 (Miss. 1997).

This Court should not review Joseph's HIPPA argument.

D. Joseph was not denied due process of law.

Joseph contends in his Petition that he was denied due process of law because the Commission must provide him with nothing less than a "full and fair hearing." The Commission did not reach the merits of Joseph's claim because it dismissed his appeal as a discovery sanction. Thus, whether or not Joseph received a "full and fair hearing" is not before this Court.

Traditionally, the due process right to receive a full hearing before the Commission is not without limitation. Although courts recognize that a party must be given an opportunity to be heard, "dismissal with prejudice is appropriate when a party pursues a claim in a manner that abuses that opportunity." *Preston & Chambers v. Koller*, 943 P.2d 260, 263 n.2 (Utah App. 1997).

Joseph was asked for all of the discovery long before the March 30, 2001 deadline. Clearly, he had the requested items but chose not to produce them to the City. Joseph apparently believes that regardless of his willful disregard of the discovery process, he was still entitled to proceed to a hearing on the merits. The Court of Appeals rejected that argument:

> Joseph argues that the meaning behind "the opportunity to be heard, at a meaningful time and in a meaningful manner, (citation omitted) in this context, immunizes him from dismissal, regardless of his conduct. He is incorrect.[2]

Joseph v. Salt Lake Civil Service Comm'n, 53 P.3d at 15. The Court of Appeals correctly concluded that the "Commission did not violate Joseph's due process right to a post-deprivation hearing." *Id.* Thus, Joseph's argument is unavailing.

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2. In the opinion set forth in Joseph's Brief at App. 7, Joseph incorrectly quotes the Court of Appeals as stating "He is correct." The correct quotation is as set forth above, to wit "He is incorrect." *See, e.g., Joseph*, 53 P.3d at 15.

E. The Court of Appeal's decision is not in conflict with case law.

Joseph claims that the Court of Appeals' decision is in conflict with the decisions of *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746 (Utah App. 1997) and *Vetterli v. Civil Serv. Comm'n*, 145 P.2d 792 (Utah 1944). A reading of the decision, however, reveals that it does not conflict with either of those cases. In *Vetterli*, the Court addressed the question of whether the Commission exceeded the scope of its authority when it set aside the Chief's order of discharge and substituted instead a six-month suspension. 145 P.2d at 794. In *Lucas*, the Court of Appeals set forth the two inquiries that the Civil Service Commission must make in reviewing disciplinary decisions. Neither the *Vetterli* nor the *Lucas* decisions dealt with the authority of the Commission to dismiss an appeal as a discovery sanction. As such, both cases are inapposite and do not create conflicts sufficient to support review by a writ of certiorari.

Rather, the Court of Appeals in Joseph based its decision on well-established law:

> When an administrative agency determines that a party has not complied with legitimate discovery requests due to "'willfulness, bad faith, . . . fault, or persistent dilatory tactics frustrating the judicial process,'" the agency acts within its discretion in imposing sanctions. *Hales v. Oldroyd*, 2000 UT App 75 ¶ 16, 999 P. 2d 588 (citation omitted). "'[T]he choice of an appropriate discovery sanction [including the entry of default against the noncomplying party] is primarily the responsibility of the [agency],'" and "we have long held that we

> will not interfere [with this choice] unless' "abuse of that discretion [is] clearly shown."'" *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997) (citations omitted) (fifth alteration in original).

Joseph, 53 P.3d at 15.

The Court of Appeal's conclusion that the Commission "had ample basis to justify sanctioning Joseph for his continued failure to comply with the City's discovery requests" (*Id.*) makes it clear that the Commission did not abuse its discretion in choosing to dismiss Joseph's appeal as a discovery sanction. Thus, the court's decision is not in conflict with other decisions on the same issue nor is the decision a departure from the accepted and usual course of judicial proceedings that would call for an exercise of this Court's supervision.

MISSTATEMENTS MADE IN JOSEPH'S PETITION

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, the City is compelled to point out the numerous misstatements made by Joseph in his Petition for Writ of Certiorari. In addition to the numerous misstatements identified above, the City has identified two categories under which the other misstatements and inaccuracies fit.

A. Joseph has altered a public document by changing the appeal number in order to cause the Court to believe that it was part of the record below.

Attached as Pet. App. 32-43 to Joseph's Petition is a document entitled "Memorandum in Support of Motion for Relief from Judgment." Joseph shows the appeal number of that pleading as Appeal No. 20010399-CA which is the appeal

number for the termination appeal. However, that document was never filed in the termination appeal. Rather, it was filed in the twenty-day suspension appeal, Appeal No. 20001111-CA. (Resp. App. 5). Joseph has altered the document by changing the appeal number from the twenty-day suspension appellate case in order to cause this Court to believe that it was part of the record in the termination appeal.

As further evidence that Joseph's alteration was deliberate is his representation at page 23 of his Petition that the City quoted Dr. McCann's conclusion "verbatim in the Utah Court of Appeals to oppose Officer Joseph's motion for relief of judgment. (Pet. App. 32)." A review of the City's opposition to Joseph's motion for relief (Resp. App. 5) did not refer to Dr. McCann's conclusion at all since the motion for relief of judgment (Pet. App. 32) was filed in the twenty-day suspension matter which did not deal with the fitness for duty evaluation, Dr. McCann's conclusion or Joseph's employment termination.

Joseph should not be allowed to alter the appeal number on a court document in order to give this Court the erroneous perception that the document was part of the record below when it was presented in another appeal entirely. Rule 14.4 of this Court's rules states that the "failure of a petitioner to present with accuracy . . . whatever is essential to ready and adequate understanding of the point requiring consideration is sufficient reason for the Court to deny a petition." Here, Joseph's alteration of the appeal number on the court document clearly presents an inaccurate representation of the record below and should be sufficient reason for this Court to deny his Petition[3].

3. This is not the first time that Joseph has engaged in this type of conduct. In an earlier Petition (No. 02-1211) before this Court, he misrepresented the date the Utah Supreme Court issued its Order (Cont'd)

B. Joseph misstates his case by relying on documents and things that were not part of the record.

The Court of Appeals issued an Order striking numerous documents from Joseph's addendum to his appellant's brief in the twenty-day suspension appeal.

Now in the appeal of his termination, Joseph has appended to his Petition documents that were stricken in the twenty-day suspension appeal and were never part of the record in the termination appeal. Those documents include Pet. App. 71-72 and 77-78.

In the termination appeal, Joseph filed with the Court of Appeals a Motion to Supplement the Record (Pet. App. 26-31) which was denied in its entirety (Resp. App. 7). Undaunted, Joseph nevertheless attaches documents to his Petition that the Court of Appeals refused to accept. Those documents include Pet. App. 55, 56-67, 60, and 61-62.

Joseph has appended numerous other documents to his Petition that were never part of the record in the termination appeal. Those documents include Pet. App. 18, 32-44, 63, 64, 65-66, 67-68, 69-70, 73-74, 75, 76, 79-82, 83-86, 87-92, and 93-94.

By presenting documents to this Court as if they were part of the record below, Joseph is knowingly presenting an

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(Cont'd)

denying Joseph's Petition for Writ of Certiorari, changing the date from November 12, 2002 to November 14, 2002. This misrepresentation caused it to appear that Joseph had filed his Petition in a timely fashion (i.e. 90 days from November 14, 2002) when, in actuality, his Petition was filed 92 days from the actual date, November 12, 2002.

inaccurate picture of the proceedings and issues. Joseph repeatedly violates Supreme Court Rule 14.4 throughout his Petition and, accordingly, this Court should deny Joseph's Petition.

CONCLUSION

Joseph's Petition is nothing more than one more effort to reargue, and even rewrite, the facts of his case. Despite the fact that this Court denied his Petition for Writ of Certiorari in the twenty-day suspension appeal, Joseph again raises many of the issues of that appeal as if they were part of the termination appeal. Joseph raises issues in his Petition that were never raised with the Civil Service Commission or the Utah courts and attempts to offer evidence that was never part of the record. Joseph's Petition is replete with misstatements and inaccuracies, including the alteration of a court pleading, justifying this Court's denial of Joseph's Petition.

For these reasons, the City respectfully requests that this Court deny Joseph's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

RESP. APP. 1

IN THE UTAH COURT OF APPEALS

ORDER

Case No. 20010399-CA

Robert L. Joseph,

Petitioner,

v.

Salt Lake City Civil Service Commission
and Salt Lake City Corporation,
Police Department,

Respondents.

This matter is before the court upon appellant's petition for rehearing, filed August 12, 2002.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 16th day of September, 2002.

FOR THE COURT:

/s/
Judith M. Billings
Associate Presiding Judge

RESP. APP. 2

January 5, 2001

Roger H. Bullock
Strong & Hanni
9 Exchange Place #600
Salt Lake City, UT 84111

Re: *Scott v. Salt Lake City Corporation and Joseph*

Dear Roger:

On August 14, 2000, I wrote to you and Mr. Gooch concerning our request that the parties enter into a Stipulated Confidentiality Agreement that would result in a Protective Order. As I indicated in that letter, the City has numerous documents that may be relevant to the allegations, claims and defenses in the above case, including Internal Affairs files and psychological information concerning Mr. Joseph.[1] We feel that we are required to produce the information pursuant the Fed. R. Civ. P. 26 but had hoped to have the confidentiality agreement and the protective order in place prior to disclosure. I never heard from you as to whether you and Mr. Joseph would enter into the agreement and allow a Protective Order to issue.

Mr. Gooch has indicated that he will enter into the Stipulated Confidentiality Agreement and approve as to form the Protective Order. We, of course, are willing to do so as well. Certainly, the only way for the agreement and order to have any effect is to

1. Mr. Joseph has already received copies of these documents as part of the Civil Service appeals he has filed. His receipt of this information in the Civil Service matters does not obviate our duty to produce the documents in the instant matter.

have all parties bound by the agreement and order. Since much of the protection to be gained by the Stipulated Confidentiality Agreement and Protective Order will inure to Mr. Joseph, we trust that you and Mr. Joseph will also be willing to execute the documents and be bound by their terms.

I have enclosed the Stipulated Confidentiality Agreement and the Protective Order for your signature and Mr. Joseph's signature. If I do not hear from you or receive the enclosed documents bearing your signatures by January 12, 2001, I will assume that neither you nor Mr. Joseph feels a need to protect the confidentiality of the records and we will produce the documents without a confidentiality agreement or Protective Order in place.

I will rely on you to convey this information to Mr. Joseph in his capacity as both your client and as the counterclaimant pro se. I will not be communicating with him directly regarding the matters contained in this letter.

Thank you for your attention to this matter.

Very truly yours,

/s/
Martha S. Stonebrook
Assistant City Attorney

enclosures
cc: Steven W. Allred

RESP. APP. 3

January 25, 2001

Ms. Martha S. Stonebrook, Esq.
Salt Lake City Attorneys Office
451 South State Street, Room 505
Salt Lake City, Utah 84111

Re: Scott, Westley v. Joseph, Robert

Dear Martha:

This letter is to advise that Rob Joseph does not require a protective order.

Thank you for your cooperation.

Yours very truly,

/s/
STRONG & HANNI
Roger H. Bullock

RHB/kk

cc: Rob Joseph
Jeffrey D. Gooch
Kent W. Spence
John M. Chipman
D. Bruce Oliver

RESP. APP. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ORDER

Case No. 2:000V340DAK

ROBERT JOSEPH,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION, et al.,

Defendants.

This matter is before the court on (1) Defendant Utah Attorney General's Office's Motion to Dismiss Amended Complaint; (2) Utah Attorney General's Office's Motion to Strike; (3) Defendant Dick Shepherd's Motion to Dismiss; (4) Defendant Steve Bartlett's Motion to Dismiss; (5) Defendant Bartlett's Motion to Strike; (6) Plaintiff's Motion for Leave to Conduct Discovery; (7) Plaintiff's Motion for Sanctions for Attorney Misconduct; (8) Defendant Salt Lake City Defendants' Motion to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief; (9) Plaintiff's Motion for Summary Judgment Against Attorney General's Office; and (10) Plaintiffs Motion to File In Camera Plaintiffs Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney General.[1]

1. The last two motions listed (numbers 9 & 10) were not argued at the June 23, 2003 hearing but are ripe for decision by the court at this time.

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A hearing on the motions was held on June 23, 2003. At the hearing, Defendant Attorney General's Office was represented by Peter L. Rognlie and Peggy Stone; Defendants Dick Shepherd ("Shepherd") and Steve Bartlett ("Bartlett") were represented by T. J. Tsakalos; The Salt Lake City Defendants (the "City Defendants") were represented by Steven W. Allred and Martha S. Stonebrook; Plaintiff Robert Joseph ("Plaintiff') was represented by D. Bruce Oliver. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the motions under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Order.

I. ATTORNEY GENERAL'S OFFICE'S MOTION TO DISMISS (#103) AND MOTION TO STRIKE (# 132)

The Attorney General's Office argues that it should be dismissed because, among other reasons, it is entitled to 11th Amendment Immunity and because it is not a "person" for purposes of 42 U.S.C. § 1983 and § 1985.

The court agrees that the Attorney General's Office must be dismissed from this action on the following grounds: (1) the Attorney General's Office is immune from suit in federal court, and Plaintiff has not demonstrated that the State has waived its 11th Amendment immunity, (2) the Attorney General's Office is not a "person" amenable to suit under § 1983; (3) Plaintiff has failed to state a claim because there is no § 1983 liability for violation of a state statute, (4) the state statute relied upon by Plaintiff is inapplicable to the facts at issue in this case; (5) *Ex Parte Young* does not apply to the claims against the

Utah Attorney General's Office because it is not a "state official" under *Ex Parte Young* and because Plaintiff does not seek the declaratory or prospective injunctive relief contemplated by *Ex Parte Young*.

Because the court has not relied on any of the attachments that the Attorney General's Office has moved to have stricken, the motion to strike is moot.

II. DEFENDANT DICK SHEPHERD'S MOTION TO DISMISS (#108)

The court finds that Defendant Dick Shepherd is entitled to dismissal from this action because (1) prosecutorial immunity is an absolute bar and precludes any of the claims against him; (2) Plaintiff's claims are barred by the doctrine of claim preclusion; (3) Plaintiff's claims are barred by the doctrine of issue preclusion; and (4) Plaintiff has failed to state a claim against him because the January 18, 2000 letter about which Plaintiff complains does not support any claim against him.

III. DEFENDANT STEVE BARTLETT'S MOTION TO DISMISS (#118) AND MOTION TO STRIKE (#142)

The court finds that the claims against Defendant Bartlett are dismissed because (1) the claims are barred by the doctrines of claim preclusion and issue preclusion, (2) Bartlett is entitled to prosecutorial immunity; and (3) even if he is not entitled to prosecutorial immunity, he is entitled to qualified immunity.

Because the court has not relied on Addendum C, E, H, or I in reaching its determination, it is not necessary for the court to decide whether to strike these documents from Plaintiff's Opposition Memorandum.

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IV. PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT DISCOVERY (#137)

All parties submitted this motion for the court to decide based on the briefs. Under Rule 26(d) of the Federal Rules of Civil Procedure ("FRCP"), discovery is generally not permitted until the parties have conferred as required by FRCP 26(f). Plaintiff, however, seeks to conduct discovery prior to the Attorney's Planning Meeting. The court finds that there is no good cause for permitting discovery prior to the time frame set forth in FRCP 26(d).

V. PLAINTIFF'S MOTION FOR SANCTIONS FOR ATTORNEY MISCONDUCT (# 139) AND CITY DEFENDANTS' MOTION TO STRIKE MOTION FOR SANCTIONS FOR ATTORNEY MISCONDUCT AND MOTION FOR RELIEF (# 152)[2]

Salt Lake City Corporation (the "City') had previously retained Roger Bullock of Strong & Hanni to represent Mr. Joseph in Wesley Scott's action against Plaintiff Joseph and the City. The Agreement between the City and Mr. Bullock provides that "all documents and records produced by the Attorney in connection with this Agreement shall become and remain the property of the City," unless contrary to the attorney-client privilege. It also provides that, at the completion

2. The Attorney General's Office has joined in the City's request that this court impose relief to deter Plaintiff s future efforts to hams, annoy, vex, and embarrass. The Attorney General's Office points out that it has previously called the court's attention to Plaintiff's ad hominem attacks on other counsel to embarrass or harass them. Additionally, Defendants Bartlett and Shepherd also join in this portion of the City Defendants' motion.

of the services under the Agreement, all such documents, data, and records shall, at the option of the City, be arranged, indexed, and delivered to the City.

On or about September 16, 2002, the City Defendants filed a motion to stay the instant proceedings until the court had ruled on Plaintiff s Motion to Amend Complaint. This court granted the stay on September 23, 2002. Apparently prior to receiving the court's Order, Plaintiff had issued a subpoena to Mr. Bullock for his billing and correspondence files. Mr. Bullock notified Ms. Stonebrook that he had received the subpoena, and Ms. Stonebrook prepared a motion to quash the subpoena, based upon this court's Order staying all proceedings. The court granted Ms. Stonebrook's motion. Pursuant to the Agreement between the City and Mr. Bullock, the City requested delivery of all documents in the *Scott v. Joseph* case. Mr. Bullock complied.

A. Plaintiff's Arguments

Plaintiff seeks $50,000 in sanctions against Ms. Stonebrook and/or the City for violating the local rules regarding honesty and fidelity, obstruction of justice pursuant to 18 U.S.C. § 1512 (b) (witness tampering and using intimidation to corruptly persuade another to withhold documents or testimony), and Utah Rule of Professional Conduct 8.4(a) and (d) (inducement of another to engage in misconduct and engaging in conduct that is prejudicial to the administration of justice). Plaintiff also claims that the motion is based on violations of the 1st and 14th Amendments to the United States Constitution. He contends that the integrity of the files is "forever destroyed." He also claims that he should be able to present this conduct to the jury as part of its "pattern of racketeering activities," for purposes of Plaintiff s RICO claims against Defendants.

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B. The City Defendants' Arguments

In response, the City Defendants request that this court strike Plaintiff's Motion for Sanctions because of its conclusory and baseless, scandalous assertions against Ms. Stonebrook, and they request that this court craft some remedy to prevent the uncivil way in which Plaintiff and his counsel have litigated this case.

The City Defendants first set forth a brief history of Joseph's termination, which is at the heart of the instant lawsuit. The following history is set forth in an opinion from the Utah Court of Appeals in *Joseph v. Salt Lake City Civil Service Commission*, 2002 UT App. 254 ¶ 2, 53 P.3d 11:

> In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City) determining that he had acted unprofessionally and had violated the City's deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who in March of 2000 submitted to the City the following conclusions regarding Joseph:
>
> > [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and other incidents. His personality traits have caused him to be excessively self-centered and

> unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision, or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.[3]

Based at least in part on this evaluation, the City's Chief of Police, Mac Connole, terminated Joseph's employment. The Utah Court of Appeals upheld the Civil Service Commission's determination, and the Utah Supreme Court denied certiorari. Plaintiff has apparently filed a petition for certiorari with the United States Supreme Court.

The City Defendants claim that, as a result of this termination, Plaintiff has engaged in a relentless barrage of judicial, administrative, and public efforts to punish the City, its employees, and others who he perceives to have waged a secret and

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3. The fact that Mr. Allred repeated this language from the Utah Court of Appeals' opinion becomes the basis (in Plaintiff s reply memo) for Plaintiff s unreasonable assertion that Mr. Allred has now engaged in criminal conduct and should be sanctioned $250,000.

conspiratorial attack on him. The City Defendants cite several examples of Plaintiffs practice of name-calling, allegations of criminal and professional misconduct, and a general uncivil diatribe in his various litigations involving the City's attorneys.

The City Defendants argue that the litany of invectives should be stricken pursuant to FRCP 12(f) as "immaterial, impertinent, or scandalous." They argue that Plaintiff s conclusory assertions of criminal and unprofessional conduct regarding Ms. Stonebrook do not support Plaintiffs position. They highlight the fact that Plaintiff has never made a request for documents to the City. Further, the City Defendants point out that Plaintiff seeks to use this conduct as evidence of a RICO violation, but of the eight individual claims for RICO violations, none is asserted against the City. They seek to have all the conclusory statements regarding Ms. Stonebrook stricken as scandalous and as sullying the professional reputation of Ms. Stonebrook.

The City Defendants contend that aside from the scandalous and unmitigated personal attacks on Ms. Stonebrook, Plaintiff s counsel demonstrates an "unfortunate display of misinformation at best, or fabrication at worst." They claim that Ms. Stonebrook has done nothing to destroy the evidence, and in fact, the file is in the same form and condition as it was when delivered to her.

The City Defendants also point out that, while Plaintiff asserts in his motion a violation of 18 U.S.C. § 1512(b) (witness tampering), he does not appear to have alleged such a claim in his Amended Complaint. Further, he has not alleged that Mr. Bullock withheld testimony or changed his testimony or tampered with evidence. Thus, there are no facts to support a § 1512(b) claim.

Finally, the City Defendants appeal to the court for some relief from past and future harassment by Plaintiff. They ask that the court consider relief under FRCP 11, 28 USC § 1927, or such other inherent powers of the court.

C. Plaintiff's Response to the City Defendants' Motion

As a perfect demonstration of the vexatious and ever-moving target with which the City Defendants (and other Defendants) have had to contend in this litigation, Plaintiff claims in his reply memorandum that Plaintiff had a right to privacy concerning his personal and sensitive health information, i.e., his psychological exam by Dr. McCann. He argues that the City Defendants have continually failed to recognize this, and now the Utah Court of Appeals has quoted from this allegedly sensitive health information. Plaintiff now contends that such disclosure by the City Defendants is a violation of HIPAA. He claims that HIPAA criminalizes knowing and willful disclosures of identifiable health information and that Mr. Allred, in the City's Motion to Strike, has made "absurd and outlandish derogatory claims against Officer Joseph." Plaintiff claims that Mr. Allred has now engaged in criminal wrongdoing himself in defending Ms. Stonebrook's criminal conduct because Mr. Allred has "attempted to purport to this court that Officer Joseph is crazy and harassing Ms. Stonebrook." According to Plaintiff, Mr. Allred has also committed another crime by willfully and knowingly disclosing Mr. Joseph's health information to the court in a public record. Accordingly, Plaintiff requests that this court find that probable cause exists that Mr. Allred has violated Mr. Joseph's privacy with malicious harm and refer the matter to the United States Attorney's Office for screening for criminal charges. He claims that, if found guilty, Mr. Allred could be fined up to $250,000 and/or imprisoned for up to 10 years. Plaintiff also seeks $250,000 in sanctions against Mr. Allred for this wrongful disclosure.

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D. City Defendants' Reply

The City Defendants appropriately point out that Plaintiff failed to respond to their motion to strike and for other relief, and improperly brought up an entirely new argument about HIPAA violations, which was never mentioned before in Plaintiff's Motion for Sanctions for Attorney Misconduct.

The City Defendants also point out that Plaintiff has also included a "Statement of Facts" that is comprised of unsupported conclusions and allegations. They explain that they have not disclosed any information to which Plaintiff had an expectation of privacy. They also note that in the litigation between Wesley Scott and Mr. Joseph, the City requested that all parties enter into a Stipulated Confidentiality Agreement and Protective Order regarding various internal affairs files and psychological information pertaining to Joseph. Joseph's counsel declined and stated in a letter that "Rob Joseph does not require a protective order." In Plaintiffs Civil Service Commission proceedings, Plaintiff was represented by two separate, competent attorneys, and at no time did either one seek to seal Dr. McCann's evaluation. On appeal, the City was required to forward the Civil Service record to the Utah Court of Appeals, including the City's response to the appeal, which contained Dr. McCann's conclusion.[4] Again, Plaintiff took no action to seal such material until after the Court of Appeals issued its opinion. The Court of Appeals declined Plaintiff's invitation to redact the quoted provision from its opinion.

4. The City Defendants point out that they did not refer to his evaluation in their brief, rather it stated that "on April 19, 2000, the City filed its response to the [Civil Service Commission] Appeal. The Court of Appeal, sua sponte searched the record for Dr. McCann's conclusion.

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In addition to Plaintiff s failure to protect any health information that he wanted to keep private, the City Defendants contend that they could not be liable for disclosure in any event because HIPAA is inapplicable for a variety of reasons. (1) HIPAA's privacy rules were not in effect at the relevant times (the relevant portion of HIPAA did not go into effect until April 2003); (2) HIPAA does not apply in these circumstances because the City is not a "covered entity" and no part of its City-administered health plan was made public. The fitness for duty evaluation was not administered through the City's health plan, but for employment-qualification purposes; and (3) HIPAA does not provide a private cause of action.

E. Discussion

The City Defendants' Motions to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief is granted, and Plaintiffs Motion for Sanctions for Attorney Misconduct is hereby stricken. The documents requested from Mr. Bullock were the property of the City and were properly given to the City by Mr. Bullock. Plaintiff has not made a request for the documents from the City (nor could such a request be made until the appropriate time under FRCP 26(d)). Contrary to Plaintiffs counsel's sensational assertions, the court finds that there is no evidence indicating that there was anything nefarious about the conduct of the City Defendants' counsel relating to this incident. Further, the court is deeply troubled by the baseless and scurrilous allegations of criminal and professional misconduct asserted by Plaintiff s counsel against both Ms. Stonebrook and Mr. Allred in the instant motion and by Plaintiffs counsel's routine practice of including in his pleadings ad hominem attacks and/or allegations or criminal or professional misconduct regarding opposing

counsel or their clients. Plaintiff and/or his counsel have generally not conducted this litigation with an appropriate level of civility toward opposing counsel and their clients.

In addition, Plaintiffs counsel has made this complex litigation more burdensome than it needs to be by including significant amounts of scandalous and impertinent materials in virtually all of his filings, by naming defendants that clearly should never have been named, by bringing claims that are entirely unsupported, by asserting new claims in virtually every new filing, and by filing entirely unreasonable motions that consume the valuable resources of the court and opposing counsel and their clients.

The court, therefore, is compelled to take some action to prevent such vexatious litigation tactics from continuing in this three-year-old litigation. Pursuant to 28 U.S.C. § 1927[5], FRCP 11, FRCP 16(f), and the inherent powers of the court, this court hereby admonishes Plaintiff and his counsel that further unreasonable and vexatious conduct will not be tolerated. Upon motion by any Defendant, or upon the court's own motion, Plaintiff and his counsel will be responsible for any attorneys' fees incurred by Defendants in responding to any such unreasonable and/or vexatious conduct. Moreover, any further

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5. This statute provides:

> **Counsel's liability for excessive costs.**
>
> Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

filings by Plaintiff that contain accusations of criminal or unprofessional conduct—or any other ad hominem attacks against counsel or their clients-that are made without concrete supporting facts and direct legal support will be stricken from the record upon motion *by* a relevant Defendant or on the court's own motion, and Plaintiff's counsel will be fined. Plaintiff and his counsel are also hereby notified that the failure to put an end to the uncivil nature of this litigation could result in dismissal of the entire action.

VI. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ATTORNEY GENERAL'S OFFICE (#146) AND PLAINTIFF'S MOTION TO FILE IN CAMERA PLAINTIFF'S ADDENDA SUPPORTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ATTORNEY GENERAL (#148)

Because the court has dismissed the Attorney General's Office as a Defendant in this action, Plaintiff s Motion for Summary Judgment Against the Attorney General's Office and Plaintiff s Motion to File In Camera Plaintiff s Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney General are denied as moot.[6]

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6. Plaintiff sent a letter to this court on July 7, 2003, regarding "Notice of Default and Request for Ruling" on Plaintiffs Motion for Summary Judgment Against the Attorney General's Office. Plaintiff indicated in the letter that the Attorney General's Office had until June 23, 2003 to respond, but had failed to do so. However, on May 23, 2003, the court granted the Attorney General's Office's motion for an enlargement of time, and permitted the Attorney General's Office to delay its response to Plaintiffs Motion for Summary Judgment until 30 days after the ruling on the its Motion to Dismiss. *See* Order dated May 23, 2003.

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VII. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

(1) Defendant Utah Attorney General's Office's Motion to Dismiss Amended Complaint (docket #103) is GRANTED, and the Attorney General's Office is DISMISSED as a Defendant in this action;

(2) Utah Attorney General's Office's Motion to Strike (docket #132) is DENIED AS MOOT;

(3) Defendant Dick Shepherd's Motion to Dismiss (docket #108) is GRANTED, and Mr. Shepherd is DISMISSED as a Defendant in this action;

(4) Defendant Steve Bartlett's Motion to Dismiss (docket #118) is GRANTED, and Mr. Bartlett is DISMISSED as a Defendant in this action;

(5) Defendant Bartlett's Motion to Strike (docket #142) is DENIED AS MOOT;

(6) Plaintiff s Motion for Leave to Conduct Discovery (docket #137) is DENIED;

(7) Plaintiff's Motion for Sanctions for Attorney Misconduct (docket #139) is STRICKEN;

(8) The City Defendants' Motion to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief (docket #152) is GRANTED, as are Defendants Bartlett and Shepherd's

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Joinder in the Motion for Relief (docket #161) and the Attorney General's Office's joinder in the Motion for Relief (docket #189). As stated above, Plaintiff s Motion for Sanctions for Attorney Misconduct is STRICKEN, and Plaintiff is admonished that further uncivil conduct could result in pleadings being stricken, monetary sanctions being imposed, and/or dismissal of the action, as set forth above;

(9) Plaintiff's Motion for Summary Judgment Against Attorney General's Office (docket # 146) is DENIED AS MOOT; and

(10) Plaintiff s Motion to File In Camera Plaintiff s Addenda Supporting Plaintiff s Motion for Summary Judgment Against the Attorney General (docket # 148) is DENIED AS MOOT.

DATED this 17th day of July, 2003.

BY THE COURT:

/s/
DALE A. KIMBALL
United States District Judge

RESP. APP. 5

Robert L. Joseph
Plaintiff, Pro-Se
1156 East Lost Eden Dr.
Sandy, Utah 84094
Telephone: (801) 571-3098

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MEMORANDUM IN SUPPORT
OF MOTION FOR RELIEF FROM
JUDGEMENT

Appeal No. *20001111-CA*
Priority No. (14)

ROBERT JOSEPH,

Petitioner,

vs.

SALT LAKE CITY CIVIL SERVICE COMMISSION,
AND SALT LAKE CITY CORPORATION,
POLICE DEPARTMENT, AND
THE CHIEF OF POLICE,

Respondents.

COMES NOW the Petitioner, Robert L. Joseph, Pro-se, pursuant to Rule 23 (a) of the Utah Rules of Appellate Procedure, hereby submits the following Memorandum in Support of Motion

for Relief from Judgement. This Court must grant immediate relief and impose severe sanctions against the City who have, with deliberate indifference to Officer Joseph's civil rights, purported a fraud upon the Court. The City has blatantly misrepresented the facts to this Court in an effort to deceive the Court and deny Officer Joseph due process. The City has conveniently changed it's testimony to serve their own interests and meet the needs of the case at hand. It is one thing to actively put on a defense, it is another to knowingly deceive, obstruct justice, or present evidence that they know to be false, and yet purport it to be the truth before the court. This with the intent to benefit themselves or another, while deliberately depriving another of his rights. Furthermore, the City in so doing, have actively conspired to obstruct justice and deprive Officer Joseph of his civil rights in violation of 42 U.S.C. § 1985 and 42 U.S.C.§ 1983. This Court should review the materials and make a determination based on the merits.

ARGUMENT

I.
THE CITY IS DELIBERATELY DECEPTIVE AND MISLEADING.

In this matter "The City" presented a case before the Commission that was not supported by substantial evidence. In fact, the City failed to bare the burden of proof or produce any physical evidence to support their fictitious and deliberately deceptive claims, that Officer Joseph shot at Scott from a standing position as Scott was fleeing the scene, and that Scott posed no threat to Joseph's life. (R 053 at 143-4).

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Statements made by Salt Lake City Detective Mendez were in direct conflict with the physical evidence derived from the State Crime Lab and the subsequent investigation as presented to the Commission by Ballistic Expert Edward Barton and Accident Reconstructionist, David Lord. David Lord and Edward Barton, through an analysis of the physical evidence and the State Crime Lab reports concluded that Officer Joseph commenced shooting while traveling backwards on Scott's car, then continued to shoot as he was propelled or "dumped" from the car, and also shot while lying on the ground and still in danger of being run over. (R. 054 at 451-462; 054 at 545-546).

In making it's final determination and Order, the "Commission" ultimately relied on the unsubstantiated testimony of Salt Lake City Detective Jerry Mendez, and upon hearsay testimony Chief Mac Connole and Chief William Shelton, who by their own admission, did not participate in the investigation or look at the physical evidence. (R. 054 at 252-253; 346-347).

Ms. Stonebrook then argued the City's position before the Commission as if it were based on fact supported by the physical evidence, when in fact, Ms. Stonebrook knew it to be to the contrary. (See Exhibit's I & II, Affidavit's of Judge Ernie Jones, prepared by "THE CITY.")

Salt Lake Civil Service Commission Hearing Testimony.

Detective Jason Snow.

Salt Lake City Police Detective Jason Snow testified before the Commission that he assisted the State Crime Lab in their evaluation of the shot trajectories and concluded that the shots

were fired from "low to high," the highest bullet strike being 36 inches above the ground. (R 053 at 89-92). Snow's testimony was in direct conflict with that of Detective Mendez who produced no physical evidence to support his claims, that Officer Joseph fired all his shots from a standing position, "on the move" as Scott was fleeing the scene and no longer posed a threat.

Detective Jerry Mendez

Salt Lake City Police Detective Jerry Mendez testified before the Commission that based on his experience, that Officer Joseph shot from a standing position and was on the move, taking steps as he shot at Scott's vehicle. Mendez presented no physical evidence to support his flawed theories, and in fact, testified that he didn't know how fast the car was traveling, and used terms such as " Maybe" and "Probably" to substantiate his claims. Mendez testified to the following before the Civil Service Commission, examination by Bruce Reading:

Q. According to your analysis over your years of experience, how far did Officer Joseph move while he was shooting at this vehicle?

A I would say you mean front/back, side-to-side?

Q. Any direction?

A. Side, I would say probably three to five feet. Forward, maybe four to five feet.

Q. How fast does that car accelerate, do you know?

A. No, I do not.

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Q. If we're talking movement of that distance how long do you think it would take Officer Joseph to move that distance following that position?

A. I don't understand.

Q. My concern is this: You are saying he moved quite a bit?

A. Yes.

Q. Firing as he was moving?

A. Yes.

Q. The car is accelerating away, according to your theory?

A. Yes.

Q. The further the car goes, the lower he has to be to shoot, to make these strikes?

A. Okay.

Q. My question is: How was he moving according to you? Was he running or crawling, what was he doing?

A. He was moving by steps. You can cover three feet real quick by one step.

(R 053 at 143-144).

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Chief William Shelton

Salt Lake City Assistant Police Chief William Shelton testified before the Commission that he had no involvement in Officer Joseph's investigation and simply relied on an alleged eye witness who did not participate in the hearings, and what was reported to him by City investigators. Shelton even acknowledged that eye witnesses can sometimes be mistaken. Once again, no physical evidence was presented to support any of the City's claims. Shelton testified before the Commission to the following under examination by Bruce Reading:

Q. All right. If for some reason Officer Mendez and Officer Mendez' testimony is this, that the window was shot out as the vehicle was driving away from Rob Joseph. That was one of his issues. If that was an error, would that have influenced your decision in anyway that in fact the window was broken while the vehicle was coming in reverse towards Rob Joseph?

A. There was 11 rounds fired in total which is a lot of rounds, first off. In all honesty, I was more concerned with the fact that they saw Rob Joseph standing in the street firing and saw nobody else around.

Q. Have witnesses occasionally been mistaken?

A. Oh, absolutely.

Q. And if the evidence of the bullet strikes simply would not support that analysis or testimony by a witness, would that be important to you in your decision whether Mr. Joseph was out of policy?

A. It would be ridiculous for me to say I wouldn't put any stock in listening to that kind of information. Of course, that would be silly not to. But again like I say, you need to look at everything, not just a single element or single piece of evidence.

(R. 054 at 275-276).

Chief Mac Connole

Salt Lake City Acting Police Chief Mac Connole testified before the Commission that he did not look at the physical evidence and simply relied on statements and reports from investigators in making his determination. Connole testified before the Commission under examination by Bruce Reading:

Q. I think you mentioned, Chief, on your direct testimony, that one of your concerns was that Officer Joseph was shooting at this vehicle as it was driving on 7th East away from the officer?

A. Yes.

Q. Did you take a look at the physical evidence of the bullet strikes to determine whether that was true?

A. No, I relied on the information I obtained from the Internal Affairs investigator and the homicide investigators.

Q. In fact, that's why you have those investigators out there, you have to rely on them?

A. Yes.

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Q. If it has been determined or if it is determined that that investigation was flawed, that in fact the shots could not have been fired at the vehicle as it was traveling away from Officer Joseph, down 7th East, would that have changed your decision in anyway?

(R.054 at 346-347).

Chief Connole, after failing to answer the last question, also testified before the Commission that the physical evidence gathered by the County and City supported his conclusion. Chief Connole's testimony is particularly disturbing in that the City's did not present any physical evidence to the Commission from the County and City investigations. Chief Connole Civil Service Commission examination by Bruce Reading:

Q. If you find that that evidence is not accurate, in other words, that that is not the facts, would that have changed your attitude at all about the shooting being out of policy?

A. Can we discuss it? Q. Sure. Absolutely. A. I think that when I came to this conclusion that you need to look at the county attorney has an investigator there, we have a homicide investigator there, and completely independent of those two we have an Internal Affairs investigator there. All of them said that there was inconsistencies with what Officer Joseph said occurred and what they found as evidence to their investigation.

Q. Would you put higher priority on the physical evidence or the testimony of individuals?

A. Well, I'm saying that they used physical evidence in their investigation. I know you are going to bring expert witnesses in. And that's fine. If you can prove it beyond a reasonable doubt, that's good too. But the information that I had and the evidence that I had is the reason that I decided the way I did.

(R. 054 at 348-349).

Ms. Martha Stonebrook

Ms. Stonebrook and the City's witnesses maliciously fabricated a case void of the truth or material fact. The City's case lacked any evidence. That is, it was based totally on a fictional and deliberately bifurcated and misleading accounts of the facts, that only went to serve their own interests at the expense of Officer Joseph's due process rights. Steve Allred, Ms. Stonebrook, Chief Connole, Chief Shelton and Detective Mendez produced no physical evidence to support their false claims that Officer Joseph fired all his shots from a standing position, "on the move" as Scott was fleeing the scene and no longer posed a threat. Ms. Stonebrook attempted to convince the Commission that the investigations conducted by the County and the City concluded one thing, when she knew full well that the facts did not support their position. In so doing, the City has deliberately and maliciously purported a fraud of the most egregious kind. The City has attempted to convey facts to this Court that they know not to be the truth. The City even attempted to put before the Commission and this Court fabricated facts about the District Attorney's conclusions and basis for dismissal of the criminal charges against Officer Joseph. Officer Joseph previously attempted to put before the Court in his Addenda

accompanying his Brief, documents and evidence known to the City to refute their false claims and impeach their testimony. The City objected to those Addenda claiming that they were not part of the official record:

> "It is well recognized that an appellate court's review is "limited to the evidence contained in the record on appeal." *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279, (holding that an appellant's addendum may not consist of evidence that is outside the record on appeal). (See Brief of Respondents).

The City's actions were specifically intended to deprive Officer Joseph of his due process and other State and Federal Constitutional Rights. Mr. Allred and Ms. Stonebrook, as it will be evident to this Court after a review of Exhibits I&II have indeed purported a fraud upon this Court. The following Affidavits were prepared by the City to be used in other matters involving Officer Joseph and were intended to deprive him of reimbursement of legal costs in the matter of the *State of Utah v. Robert L. Joseph.*

The Petitioner, Officer Joseph, respectfully submits to this Court that Ms. Stonebrook and the City have blatantly misrepresented the facts before the Commission and this Court in violation of Title 42 U.S.C. § 1983 and are guilty of conspiracy to obstruct justice in violation of Title 42 U.S.C. § 1985(2). This Court should not let the City get away with its deception by presenting FICTION. The Petitioner, Officer Joseph respectfully pleas to this Court for immediate relief from judgement and requests that the Court consider the evidence attached in support of his Motion for Relief from Judgement:

Appendix 5

EXHIBIT I
FIRST AFFIDAVIT OF JUDGE ERNIE JONES

The City prepared an Affidavit for the Honorable Judge Ernie Jones in the matter of Loni F. Deland and Robert Leon Joseph v. Salt Lake City Corporation, in the Third District Court Salt Lake County, State of Utah. The City prepared and submitted to the court the sworn statements of Judge Jones about the facts that lead to the dismissal of Officer Joseph's criminal case. These facts are the truth, and are in direct conflict with the City's position before the Commission and this Court. The City, in submitting these Affidavit's before the Third District Court swear them to be the truth. What this Court should find particularly disturbing about this first Affidavit is that it is dated April 6, 2001.. The City's Brief to this court was filed on November 6, 2001. At the time the City submitted their Brief, Ms. Stonebrook knew or reasonably should have known that the evidence and testimony presented by the City to the Commission and subsequently to this Court was fragrantly false. The following pertinent part, is taken from the sworn testimony prepared and submitted by the City to the Third District Court:

> 10. The State crime lab performed a laser reconstruction of the bullet strikes from officer Joseph's weapon on the vehicle. The laser reconstruction showed the shots were fired while Officer Joseph was sitting or lying on the ground. The trajectory was "low-to-high" in angle.
>
> 11. The results of this reconstruction appeared to contradict that State's earlier theory which was that Officer Joseph was standing up when he fired at the victim's vehicle.

Appendix 5

EXHIBIT II
SECOND AFFIDAVIT OF JUDGE ERNIE JONES

The City prepared a second Affidavit for the Honorable Judge Ernie Jones in the matter of Loni F. Deland and Robert Leon Joseph u Salt Lake City Corporation, in the Third District Court Salt Lake County, State of Utah on April 17, 2002. Once again, the City prepared and submitted to the court a sworn Affidavit by Judge Jones, that the City knows to accurately reflect the facts or evidence of Officer Joseph's case. In light of this Affidavit it should be obvious to this Court that the City is guilty of misconduct and purporting a fraud upon this Court. This Affidavit reads, in pertinent part:

> 9. I have also reviewed the report prepared by the State Crime Lab showing that the bullet trajectories were slightly upward direct, that is, from "low-to-high" as I had previously testified. A copy of that report is attached hereto.
>
> 10. I have also reviewed copies of photographs of the laser tests and the dowel and rod test that I also reviewed as part of my decision to dismiss the charges against Mr. DeLand's client. These photographs led me to conclude that the shots fired were from "low-to-high" and that the state's earlier analysis that Officer Joseph was standing when he fired the shots was incorrect.
>
> 11. From these tests and photographs, I concluded that it was more likely than not that Officer Joseph was either falling down or was on the ground

and that such facts were not inconsistent with his statement. Accordingly, I determined, after consultation with a review committee of prosecutors, to dismiss the charges against Mr. DeLand's client.

EXHIBIT III
SUPPORTING DOCUMENTS AVAILABLE TO THE CITY.

A. District Attorney Memorandum Dated November 18, 1999.

The City had this memorandum prior to the filing of their Brief and yet they still moved forward with misrepresenting the facts to this Court and failed to present the facts objectively. The memorandum in its entirety is clearly in conflict with the City's analysis of the incident and their claims about the evidence derived from the District Attorney's investigation and conclusions.

The following pertinent parts speak specifically to the issue of whether or not Officer Joseph was standing or "on the move" when the shots were fired:

> Tests completed by the State Crime Lab show the angle of the shots fired into Mr. Scotts vehicle were from "low to high." This analysis suggests that shots were fired while the officer was on the ground and in danger of being run over by the vehicle. While the injuries to Wesley Scott were serious it appears that Mr. Scott created the situation which caused these injuries.

Appendix 5

Officer Joseph was justified in shooting Wesley Scott because of the threat of being run over or injured by Mr. Scott's vehicle.

Also Officer Joseph was justified in using deadly force to effect the arrest and preventing the escape of Mr. Scott after the assault was committed.

B. Motion to Dismiss, State's Response and Order of Dismissal.

Assistant District Attorney Prosecutor Ernie Jones was assigned Officer Joseph's criminal case. Mr. Jones was presented with all the erroneous and fabricated facts and evidence generated by Salt Lake City Police Detective Jerry Mendez. Mr. Jones, after being confronted by the facts adduced at Officer Joseph's preliminary hearing, as well as evidence based upon expert reconstruction and upon further review of the State's peace officer use of deadly force statute, concluded that the evidence did not support the original theories as presented by Detective Mendez and other investigators. Upon a motion by attorney Mr. Loni Deland, the case against Officer Joseph was dismissed "with prejudice."

Appendix 5

II.

THIS COURT SHOULD, IN THE ALTERNATIVE, REMAND THE CASE BACK TO THE CIVIL SERVICE COMMISSION FOR AN EVIDENTIARY HEARING IN LIGHT OF THE CITY'S MISCONDUCT.

The Utah Court of Appeals has reasoned in *State of Utah v. Sixteen Thousand Dollars*, 914 P.2d 1176 (1996), "[A] party asserting error must first present the issue to the trial court through post judgement motion prior to seeking appellate review." Then, the Court went on to clarify, "Again, the proper course for an aggrieved party to follow would be to make a Rule 60(b) motion for relief from judgement, see Utah R Civ. P. 60(b)(7) (allowing a motion to be made on the basis of "any other reason justifying relief from the operation of the judgement"), or a motion for a new trial, or amend the judgement, pursuant to Rule 59. See Utah R Civ. P. 59(a)(5),(a)(6), (a)(7) (indicating that excessive damages, such a motion) ..... Id Consistent with that, the court explained, "A trial court should be given an opportunity to correct errors of law, as well as to excuse a defaulting party when reasonable, so as to resolve any arising controversy before appeal." Id (citations omitted).

The concept of allowing the trial court, or in this particular case, [The Civil Service Commission] an opportunity to correct it's error is long standing and should be consistent with the Petitioner's Motion in the Alternative. The Petitioner did originally file a Motion for Reconsideration with the Civil Service Commission on August 1, 2000. The Commission denied the motion on December 6, 2000 supporting the City's argument that the Petitioner's filing of a Petition for Review with this Court divests the Commission of jurisdiction.

Appendix 5

In light of the City's deliberately deceptive conduct, the Court in the Alternative should grant the Petitioner leave or remand the case back to the Commission for a new hearing in the interest of justice and allow the Commission to correct it's errors and perfect the record so that they may issue an objective finding from the truth.

CONCLUSION

This Court should be outraged and offended by the conduct and pattern of abuse by the City in this matter. The City was deliberately deceptive and misleading in presenting facts before the Commission and subsequently to this Court that they knew to be false. This Court should conclude after a review of the evidence that the City did willfully purport a fraud upon the Court, and did so, with the malicious intent to obstruct justice and deprive the Petitioner of his due process rights.

The Petitioner respectfully requests: 1) that this Court grant his Motion for Relief from Judgement; 2) set aside the Commission's Findings of Fact, Conclusions, and Order; 3) order the City to reimburse the twenty day suspension with interest; 4) and award legal costs and reasonable attorney's fees in conjunction with the matter before the Civil Service and this Court.

In the Alternative, the Petitioner requests, in the interest of justice, that the case be remanded back to the Commission for an evidentiary hearing. The Petitioner further pleas in the Alternative, that in light of the City's misconduct and deception, that they also be ordered to pay legal costs and reasonable attorney's fees accrued to this point.

Appendix 5

Dated 25th of June, 2002

/s/

Robert L. Joseph, Petitioner Pro-se

RESP. APP. 6

STEVEN W. ALLRED, #0060
Acting City Attorney
MARTHA S. STONEBROOK, #5149
Assistant City Attorney
Attorneys for Respondents
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Salt Lake City, UT 84111
Telephone: (801) 535-7788

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MOTION TO STRIKE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT OR ALTERNATIVELY REPLY MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT

Case No. 20001111-CA
Priority No. 14

ROBERT L. JOSEPH,

Petitioner,

vs.

SALT LAKE CITY CIVIL SERVICE COMMISSION, SALT LAKE CITY CORPORATION, SALT LAKE CITY POLICE DEPARTMENT, and the CHIEF OF POLICE,

Respondents.

Appendix 6

BACKGROUND

On January 3, 2000, the Salt Lake City Police Chief suspended Petitioner for 20 days after Petitioner was found to be in violation of City policy. Petitioner was found to have violated policy after he pulled over a vehicle for a traffic stop, that vehicle attempted to flee, and Petitioner fired eleven shots at the suspect, striking him once in the face and once in the foot.

Petitioner appealed the suspension to the Salt Lake City Civil Service Commission. After two days of hearing, during which the City called 8 witnesses and submitted 15 exhibits, the Commission unanimously found that the Chief's decision was supported by the evidence.

Petitioner appeals that decision to this Court. Petitioner filed his opening Brief, to which Respondents replied. Petitioner did not file a Reply Brief. Respondents were advised that this matter would be decided without oral argument. The matter is currently under consideration by this Court.[1]

On June 25, 2002, Petitioner filed this subject Motion.

---

1. Petitioner has another appeal from a subsequent decision of the Civil Service Commission (#20010399) dismissing his appeal for failing to cooperate with discovery. The Civil Service Commission appeal was as a result of being terminated after the Chief of Police found, based upon an independent psychological examination that Petitioner was unfit for duty as a police officer.

Appendix 6

ARGUMENT

I.

PETITIONER'S MOTION SHOULD BE STRICKEN

A.

THE MOTION IS IMMATERIAL

Petitioner's almost singular focus, in his Motion, is that there may have been a factual dispute regarding his relative position at the time he fired eleven rounds at a moving vehicle. Such dispute, while perhaps of some relevance in a criminal proceeding, is of no moment in a Civil Service Commission disciplinary proceeding.

The question before the Commission, and now this Court, was simply if the evidence sustained a finding that Petitioner violated City policies.

The Commission made no findings regarding the subject matter of Petitioner's Motion and limited itself to the following Conclusions:

1. Joseph engaged in unprofessional conduct that put himself in a position of danger.

2. Joseph used deadly force after all threat to him had passed.

3. Joseph shot at Scott's vehicle as it was moving away from him.

Appendix 6

4. Joseph violated Police Policy 3-06-02.00 (Deadly Force).

5. Joseph violated Police Policy 3-06-05.02 (Firing at or from a Moving Vehicle). (R. 051-052; see also Addendum 3, Brief of Respondents.)

Those Conclusions were based, *inter alia*, on a *stipulated* fact that Petitioner "fired eleven rounds, two of which hit Scott (one in the cheek and one in the foot)." (See Statement of Undisputed Facts, R. 042-045; R. 053:8 and Addendum 4, Brief of Respondent.)

The Commission also found, based upon *stipulated* facts, that Petitioner pulled his vehicle in front of Scott's car at an angle; did not call dispatch when he initiated the traffic stop; exited his vehicle and approached the Scott vehicle, ultimately opening the driver's side door – all of which resulted in Petitioner's unnecessarily placing himself in danger. (See Addendum 4, Brief of Respondent; R. 042-045.)

In addition, the Commission further found: "Joseph fired at least two shots at Scott's vehicle as the vehicle was moving away from him" and that two eye witnesses provided corroborative evidence. (See also R. 049-050; Addendum 3, Respondent's Brief.)

Even Petitioner's own testimony confirms the Commission's Findings. He testified that he fired his service weapon as he came up off the ground. (R. 054:393.) He testified that his vision was blurry and that he could not focus on the weapon's front sight nor could he focus on the Scott vehicle at which he was firing. (R. 054:393.)

Appendix 6

A review of the balance of the Commission's Findings of Fact and Conclusions makes it clear that not only was there ample evidence submitted to support the Commission's Order, but that the issues attempted to be raised by the current Motion are wholly extraneous and immaterial to the considerations of this matter.

B.

THE MOTION IS IMPERTINENT

Petitioner's Motion assails the ethics of counsel and others claiming that they engaged in "malicious fabrication" of "fictional and deliberately bifurcated and misleading accounts" and that counsel has "deliberately and maliciously purported a fraud of the most egregious kind."

Petitioner's calumnious remarks are not supported by anything greater than his own ill-perceived outrage. They have no tendency to make any fact material to these proceedings any more or less probable and appear to be little more than a trial run at allegations intended for other litigation.[2]

This Court should not welcome nor sanction such conduct and should strike such impertinent statements from the record in this matter.

---

2. Petitioner has previously filed an action pursuant to 42 U.S.C. § 1983 against the City and some of its officers. He has recently, through his counsel, advised the city that he intends to amend such action to include, *inter alia*, a claim for conspiracy.

Appendix 6

C.

THE MOTION SHOULD BE STRICKEN AS UNTIMELY

Petitioner's Motion, in addition to its other fatal flaws, is untimely. Petitioner had the opportunity to raise such matters in his opening Brief. He did not. He had the opportunity to file a Reply Brief. He did not.

Petitioner's appeal is currently before the Court and is under advisement. Had Petitioner deemed the matters in his Motion relevant, he had both the ability and the opportunity to present them in a timely manner. Failing to do so, Petitioner should be precluded from submitting such materials at this late date.

ALTERNATIVE ARGUMENT IN REPLY TO PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

As an alternative to Respondent's Motion to Strike, *supra*, Respondents submit the Petitioner's Motion for Relief is meritless. As set forth in Respondent's Brief, which is adopted herein by reference, the Commission's Order is well-supported by not only stipulated facts and independent witnesses but by Petitioner's own testimony.

Petitioner's Motion should be dismissed.

DATED this 9th day of July, 2002.

Appendix 6

/s/
STEVEN W. ALLRED
Acting City Attorney
Attorney for Respondents

RESP. APP. 7

IN THE UTAH COURT OF APPEALS

ORDER

Case No. 20010399-CA

Robert L. Joseph,

Petitioner,

v.

Salt Lake City Civil Service Commission and
Salt Lake City Corporation, Police Department,

Respondents.

This case is before the court on a Motion to Supplement the Record. The motion is opposed by respondents on the grounds that petitioner seeks to introduce evidence that was not before the Commission in connection with its dismissal of petitioner's appeal.

Petitioner does not demonstrate that the materials were a part of the record before the Commission. The materials pertain to the merits of the appeal of his termination; however, the appeal was dismissed on procedural grounds without consideration of the merits. This court's review is limited to only those issues pertaining to whether the appeal was properly dismissed. It is well-settled that this court's review is limited to the evidence actually presented to the commission. See, e.g., Kelly v. Salt Lake City Civil Service Com'n, 2000 UT App 235, 115, 8 P.3d

1048; see also Utah Code Ann § 10-3-1012.5 (1999) (limiting judicial review to the record of the commission). Based upon the foregoing,

IT IS HEREBY ORDERED that the motion to supplement the record is denied in its entirety, and

IT IS FURTHER ORDERED that petitioner's brief shall be filed on or before September 17, 2001.

DATED this 14th day of August, 2001.

FOR THE COURT:
Russell W. Bench, Judge

(3)

No. 02-1781

Supreme Court, U.S.
FILED
SEP 27 2003
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

ROBERT L. JOSEPH,

Petitioner,

v.

SALT LAKE CITY CORPORATION
STATE OF UTAH

On Petition For Writ Of Certiorari
To The Utah Supreme Court

REPLY TO BRIEF IN OPPOSITION

Robert L. Joseph
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1H PP

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QUESTIONS PRESENTED

1. Whether verbatim reproductions of health information avoids the Privacy Rule under HIPAA?

2. Whether Salt Lake City is a "covered entity" or a "business associate" under HIPAA?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Robert L. Joseph (hereinafter the "Petitioner") respectfully replies to the new issues addressed by the Respondent Salt Lake City.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision at issue herein is:

Health Information Portability and Accountability Act of 1996.

STATEMENT OF THE CASE.

Since the filing of the parties' briefs, Petitioner obtained a ruling from the Department of Occupational & Professional Licensing that Dr. McCann, the doctor that prepared the Petitioner's evaluation (the individually identifiable health information) at issue, that agreed with Petitioner that Dr. McCann committed malpractice in the evaluation.

---

1 Note: It appears that the State of Utah has elected not to appear and oppose the HIPAA claims raised by the Petitioner. As will be demonstrated herein the controversial "individually identifiable health information" is very suspect and never should have been made public by the City's risk manager or by the Utah Court.

REASON FOR GRANTING THE PETITION.

NEW INFORMATION OF MALPRACTICE BRINGS QUESTION OF CONSPIRACY TO LIGHT.

The City, in its Brief in Opposition, again attempts to deprive the Petitioner justice by attempting to corruptly persuade this Court by claiming that Petitioner is a liar and suggesting that he is crazy once again relying on the bogus conclusions of the corrupt Dr. McCann. On page 12 of the City's Brief in Opposition, the City claims that it did not wrongfully disclose individually identifiable health information because it merely quoted the conclusion *verbatim* the health information, suggesting that if it's quoted its not disclosed. A preposterous argument, the City is flat wrong. HIPAA prohibits the "information" from being disclosed not the actual documents themselves. Verbatim information should be safeguarded as much as the originals.

The City then demonstrated that the U.S. District Court Judge, the Honorable Dale A. Kimball, agreed with the City because he quoted the corrupt doctor's conclusion as well, apparently suggesting reliability in the assertion. See Respondent's Appendix 4, pp. 10a-11a. Unfortunately, the City's arguments merely point outs how much easier it is to believe the doctor over a claimant's conspiracy theories.

Nevertheless, Petitioner sets out to correct the record regarding the good Dr. McCann. As this Reply Brief's appendix includes, Dr. McCann's evaluation was an act of malpractice. The conspiracy theory is true. The Petitioner does not have a disorder at all as has been the City's desire. The City, in its corruption, has set it all up! Utah's Division of Occupational Licensing's medical review panel has exonerated Petitioner's name. On September 12, 2003, the panel agreed with Petitioner that Dr. McCann committed malpractice by conducting a

evaluation that "was inadequate and incomplete to reach the diagnosis of Axis II personality disorder . . . [a]s a resulting of this negligence or deviation from the standard of care, it is claimed that Mr. Joseph suffered the loss of his employment and other damages." (Rep. App. 3)

With this information in mind, the Petitioner calls upon this Court to exercise extraordinary power. The circumstances at hand require this Court to accept certiorari. It must review the ***do's and don't's*** associated with health information in light of HIPAA. No matter how this Court looks at it. Dr. McCann's evaluation contained health information. As a physician, HIPAA certainly applies to him. He has a duty to protect Mr. Joseph's information. Even verbatim quotations by others may be injurious as demonstrated in this case if wrongfully disclosed by others. 45 C.F.R. § 164 explains that HIPAA provisions, by statute apply to the following persons:

> (1) A health plan.
> (2) A health care clearinghouse.
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1320d-2(a)(1) of this title.

Id. In this matter, even if this Court concludes that HIPAA didn't apply against the City because of the City's "health plan" then it certainly applies in this matter because Dr. McCann is a "health care provider" and the City is a business associate of Dr. McCann.

HIPAA defines business associates in 45 U.S.C. § 164.502(e), 164.504(e) and 164.532(d) and (e). HIPAA requires that any shared information requires specific agreements to "safeguard the information from misuse", and that the entity "will help the covered entity comply with some of the covered entities duties under the Privacy Rule." Covered entities may disclose protected health information to an entity in its role as a business associate *only* to help the covered entity carry out its

health care functions – not for the business associate's independent use or purpose, except as needed for the proper management and administration of the business associate.

In this matter, whether directly applied as a covered entity or as a business associate of a covered entity, the City has an affirmative duty under HIPAA to ensure that the health information generated by Dr. McCann was safeguarded. Dr. McCann's conclusions are health information generated against Mr. Joseph. At all times, that information should have been treated "private" and kept away from public scrutiny, even *verbatim* reproductions. Due to the carelessness of the City, the Utah Court of Appeals and now the U.S. District Court, District of Utah have each publicly printed the private health information.

At least in Petitioner's favor, it can now be made public that Dr. McCann's conclusions are wholly unreliable. The evaluation was the product of malpractice because it was merely generated at the behest of the City. Note: The panel recognized that Dr. McCann even altered his opinion by a simple telephone request from the City following the clinical interview. (Rep. App. 4).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L. Joseph
Petitioner Pro Se

Address:
1156 Lost Eden Drive
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(801) 571-3098

DEPARTMENT OF COMMERCE
Heber M. Wells Building
160 East 300 South, Box 146741
Salt Lake City, Utah 84114-6741
Telephone: (801) 530-6990

BEFORE THE DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENCING
DEPARTMENT OF COMMERCE, STATE OF UTAH

ROBERT L. JOSEPH

Petitioner(s)

Case No. PR-03-04-039

-v-

CERTIFICATE OF
COMPLIANCE

DAVID L. McCANN, M.D., F.A.P.A.

Respondent(s),

I, W. Ray Walker, Regulatory & Compliance Officer, Division of Occupational & Professional Licensing, Department of Commerce, hereby certify that all requirement set forth in '78-14'12, Utah Code Ann., 1953 as amended, have been satisfied regarding prelitigation review of te above-entitled matter.

Dated this 17th day of September, 2003.

s/_____
W. Ray Walker
Regulatory& Compliance Officer

Department of Commerce
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Salt Lake City, Utah 84114-6741
Telephone: (801) 530-6990

BEFORE THE DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENCING
STATE OF UTAH

ROBERT L. JOSEPH

Petitioner(s)

PANEL OPINION

-v-

Case No. PR-03-04-039

DAVID L. McCANN, M.D., F.A.P.A.

Respondent(s),

The above-entitled matter was heard Tuesay, August 19, 2003, by Gloria Miley, Richard Spencer, M.D., and Jared Faerber comprising the Prelitigation Panel as required by Utah law. Petitioner Robert L. Joseph ("Mr. Joseph") was present and represented by D. Bruce Oliver. Respondent David McCann, M.D. "Dr. McCann") was present and represented by J. Anthony Eyre.

FACTS

In March of 1999 Mr. Joseph was involved in a shooting incident while acting as a security officer for a private company. The shooting was found to be justified and Mr. Joseph was cleared of any criminal wrongdoing wit regard to the incident.

On January 4, 2000, Mr. Joseph's employer, the Salt Lake

City Police Department, order him to undergo a fitness for duty evaluation including a psychiatric independent medical evaluation performed by Dr. McCann.

Dr. McCann performed his evaluation on February 28, 2000. The evaluation was based on a clinical interview with Mr. Joseph, a clinical information inventory, a mental status examination, psychological testing, and a limited review of medical records. Dr. McCann also reviewed performance evaluations and letters from Mr. Joseph's employer produced in 1998 through February 2000. Dr. McCann also conducted an interview with Police Union President David Greer.

Dr. McCann's assessment was that Mr. Joseph suffered from an Axis II personality disorder with paranoid and narcissistic traits. Dr. McCann concluded that Mr. Joseph as psychologically unsuitable to perform the duties of a police officer.

PETITIONER'S CLAIMS

Mr. Joseph claims that Dr. McCann's evaluation was inadequate and incomplete to reach the diagnosis of Axis II personality disorder. It was alleged Dr. McCann's evaluation failed to explore adequate sources and historical information. As a result of this negligence or deviation from the standard of care, it is claimed Mr. Joseph suffered the loss of his employment and other damages.

DECISION OF THE PANEL

Under Utah law, a physician or other health care provider, is required to exercise the same degree of learning, care and skill possessed by others in good standing practicing in te same medical field. The physician or provider must use the same degree of care that other qualified physicians would exercise under the same or similar circumstances. *See Farrow v. Health*

Servs. Corp. 604 P.2d 474 (Utah 1979). Applying this standard, the Panel finds Petitioner's claims meritorious.

The Panel agrees with Mr. Joseph that Dr. McCann's diagnoses was not adequately supported by his evaluation or the information available. A diagnosis of an Axis II personality disorder requires an enduring and chronic pattern of inflexible personality traits and dysfunctional interactions consistent over a broad range of personal and social situations. The Panel does not believe Dr. McCann's evaluation was adequate to make this type of diagnoses.

Dr. McCann's interview with Mr. Joseph and his review of the records focused almost exclusively on the March 1999 shooting incident and events thereafter. Dr. McCann's interview with David Greer was also inadequate to fully evaluate Mr. Joseph as Mr. Greer had only known Mr. Joseph for a relatively short period of time. The documents reviewed by Dr. McCann were also only during 1998-2000 period. This information simply does not demonstrate the type of long-standing, continuing personality problems necessary for Dr. McCann's diagnoses. Dr. McCann's evaluation focused excessively on one event which cannot show the persistence of personality traits over many difference personal and social situations.

The Panel finds it telling that Dr. McCann changed his initial evaluation and diagnoses when he received further information. This suggests that te initial evaluation and diagnoses was based on inadequate information and that all the information available was not considered.

Based on the foregoing, the Panel finds Mr. Joseph's claim to be meritorious.

DATED this 12th day of September, 2003.

BY s/_____

Jared R. Faerber
Panel Chair